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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1963.

No. 39.

THE NEW YORK TIMES COMPANY,
Petitioner,

v.

L. B. SULLIVAN,
Respondent.

On Writ of Certiorari to the Supreme Court of Alabama.

BRIEF FOR RESPONDENT.

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INDEX.

	Page
Questions Presented	1
Statutes Involved	3
Statement	4
I. Merits	6
II. Jurisdiction	17
1. General Appearance	17
2. Validity of Service of Process on The New York Times	18
Summary of Argument	21
Argument	28
I. The Constitution Confers No Absolute Immunity to Defame Public Officials	28
Libelous Utterances Have No Constitutional Protection	29
The Advertisement Was Libelous Per Se	39
Damages Awarded by the Jury May Not Be Disturbed	40
II. There Is No Ground for Reviewing a Jury Determination That the Advertisement Was "Of and Concerning" the Plaintiff	47
III. This Case Provides No Occasion for Excursions From This Record and From Accepted Constitutional Standards	52
IV. The Times Was Properly Before The Alabama Courts	55
Conclusion	65
Certificate	65
Appendix A	67

CITATIONS.

Cases.

A. & G. Stevedores v. Ellerman Lines, 369 U. S. 355.. 43
Abernathy v. Patterson, 295 F. 2d 452, cert. denied 368 U. S. 986 31
Aetna Insurance Company v. Earnest, 215 Ala. 557, 112 So. 145..... 56
Alabama Ride Company v. Vance, 235 Ala. 263, 178 So. 438 28
Albert Miller & Co. v. Corte, 107 F. 2d 432..... 50
All States Life Ins. Co. v. Jaudon, 230 Ala. 593, 162 So. 668 44
Associated Press v. N. L. R. B., 301 U. S. 103.....27, 64
Baker v. Warner, 231 U. S. 588..... 39
Bantam Books, Inc. v. Sullivan, 372 U. S. 58..... 49
Barr v. Matteo, 360 U. S. 564.....22, 23, 29, 33, 38
Beauharnais v. Illinois, 343 U. S. 250 .....22, 24, 25, 30, 31, 32, 33, 34, 35, 39, 40, 50, 53
Beck v. Spindler, 99 N. W. 2d 670..... 63
Blankenship v. Blankenship, 263 Ala. 297, 82 So. 2d 335 56
Bornmann v. Star Co., 174 N. Y. 212, 66 N. E. 723..26, 51
Breard v. City of Alexandria, 341 U. S. 622.....22, 30
Bridges v. California, 314 U. S. 252..... 47
Burt v. Advertiser Company, 154 Mass. 238, 28 N. E. 1 .....23, 36
Callagaz v. Calhoon, 309 F. 2d 248..... 61
Cantwell v. Connecticut, 310 U. S. 296..... 35
Chagnon v. Union Leader Corp., 103 N. H. 426, 174 A. 2d 825, cert. denied 369 U. S. 830.....25, 51
Chapa v. Abernethy, 175 S. W. 165.....26, 52
Chaplinsky v. New Hampshire, 315 U. S. 568.....22, 30
Chicago B. & Q. v. Chicago, 166 U. S. 226..24, 25, 42, 43, 47

Chicago and N. W. Ry. v. Nye Schneider Fowler Company, 260 U. S. 35 42
Children v. Shinn, 168 Iowa 531, 150 N. W. 864 ..... 26, 52
Consolidated Cosmetics v. D-A Publishing Company, 186 F. 2d 906 ..... 18, 59
Constantine v. Constantine, 261 Ala. 40, 72 So. 2d 831 56
Cosgrove Studio, Inc. v. Pane, 408 Pa. 314, 182 A. 2d 751 ..... 25, 50
Craig v. Harney, 331 U. S. 367 ..... 35, 47

Davis v. Davis, 305 U. S. 32 57
Davis v. O'Hara, 266 U. S. 314 58
Davis v. Wechsler, 263 U. S. 22 58
DeJonge v. Oregon, 299 U. S. 353 35
Dennis v. U. S., 341 U. S. 494 31
Dimick v. Schiedt, 293 U. S. 474 43
Dozier Lumber Co. v. Smith-Isberg Lumber Co., 145 Ala. 317 56
E. F. Drew & Co. v. Federal Trade Commission, 235 F. 2d 735, cert. denied 352 U. S. 969 30

Eastman Kodak v. Southern Photo Materials, 273 U. S. 359 42
Edwards v. South Carolina, 372 U. S. 229 ..... 35, 47
Ex Parte Cullinan, 224 Ala. 263, 139 So. 255 56
Ex Parte Haisten, 227 Ala. 183, 149 So. 213 56
Ex Parte Textile Workers, 249 Ala. 136, 30 So. 2d 247 57

Fairmount Glass Works v. Cub Fork Coal Co., 287 U. S. 474 ..... 24, 25, 42, 43, 44, 47
Farmers Union v. WDAY, Inc., 360 U. S. 525 ..... 22, 33, 35
Faulk v. Aware, Inc., 231 N. Y. S. 2d 270 ..... 24, 41, 42
Ferdon v. Dickens, 161 Ala. 181, 49 So. 888 28
Fiske v. Kansas, 274 U. S. 380 48
Fox Film Corporation v. Muller, 296 U. S. 207 ..... 26, 55
Fox River Paper Company v. Railroad Commission, 274 U. S. 651 ..... 26, 55

Fullerton v. Thompson, 119 Minn. 136, 143 N. W. 260 ..... 26, 52
Gallick v. B. & O. R. Co., 372 U. S. 108, 9 L. Ed. 2d 618 ..... 25, 48
Galloway v. United States, 319 U. S. 372 48
Garner v. Louisiana, 368 U. S. 157 47
Grant v. Reader's Digest, 151 F. 2d 733 ..... 24, 39, 50
W. T. Grant v. Smith, 220 Ala. 377, 125 So. 393 28
Gray v. American Radiator Corporation, 22 Ill. 2d 432, 176 N. E. 2d 761 62
Gross v. Cantor, 270 N. Y. 93, 200 N. E. 592 ..... 26, 52
Guaranty Trust Company v. Blodgett, 287 U. S. 509 ..... 26, 55
Hanson v. Denckla, 357 U. S. 235 64
Harrub v. Hy-Trous Corp., 249 Ala. 414, 31 So. 2d 567 57
Herb v. Pitcairn, 324 U. S. 117 ..... 26, 55
Herencia v. Guzman, 219 U. S. 44 42
Herndon v. Lowry, 301 U. S. 242 48
Hogan v. New York Times, 313 F. 2d 354 ..... 24, 40, 46
Hope v. Hearst Consolidated Publications, 294 F. 2d 681, cert. denied 368 U. S. 956 ..... 25, 51
Howard v. Lyons, 360 U. S. 593 33
Insull v. New York World-Telegram, 273 F. 2d 166 63
International Shoe Co. v. Washington, 326 U. S. 310 ..... 20, 27, 59, 63, 64
Jackson v. National Grain Mutual Liability Company, 299 N. Y. 333, 87 N. E. 2d 283 57
Jacob v. City of New York, 315 U. S. 752 43
Johnson Publishing Co. v. Davis, 271 Ala. 474, 124 So. 2d 441 ..... 44, 57
Justices v. U. S. ex rel. Murray, 9 Wall. 274 42
Kilpatrick v. T. & P. Ry. Co., 166 F. 2d 788 62
Kirkpatrick v. Journal Publishing Company, 210 Ala. 10, 97 So. 58 28

Knapp v. Schweitzer, 357 U. S. 371 42
Konigsberg v. State Bar of California, 366 U. S. 36 .. 22
Kyser v. American Surety Company, 213 Ala. 614, 105 So. 689 56

Life & Casualty Co. v. McCray, 291 U. S. 566 42
Little v. Sugg, 243 Ala. 196, 8 So. 2d 866 44
L. & N. v. Holloway, 246 U. S. 525 42
Lorain Journal Company v. United States, 342 U. S. 143 ..... 27, 64

Mabee v. White Plains Publishing Co., 327 U. S. 178 .27, 63
Maxwell v. Dow, 176 U. S. 581 ..... 42, 47
McGee v. International Insurance Company, 355 U. S. 220 ..... 27, 60, 61, 63, 64
Miami Herald v. Brautigam, 127 So. 2d 718 36
Minnesota v. National Tea Company, 309 U. S. 551 .. 26, 55
Mo. Pac. Ry. Co. v. Tucker, 230 U. S. 340 42
Murdock v. Memphis, 20 Wall. 590 26

NAACP v. Alabama, 357 U. S. 449 58
NAACP v. Button, 371 U. S. 415, 9 L. Ed. 2d 405 55
National Cancer Hospital v. Confidential, Inc., 136 N. Y. S. 2d 921 ..... 25, 51
Near v. Minnesota, 283 U. S. 697 ..... 30, 32
Neese v. Southern Ry., 350 U. S. 77 ..... 24, 42, 44
Nieman-Marcus v. Lait, 13 F. R. D. 311 ..... 25, 51
Norris v. Alabama, 294 U. S. 587 47

Paulos v. Best Securities, Inc., 109 N. W. 2d 576 62
Peck v. Tribune Co., 214 U. S. 185 50
Pennekamp v. Florida, 328 U. S. 331 ..... 22, 23, 35, 47, 54
Polizzi v. Cowles Magazines, 345 U. S. 663 ..... 27, 61, 63
Pollak v. Public Utilities Commission, 191 F. 2d 450 .. 30
Post Publishing Company v. Hallam, 59 F. 530 ..... 23, 37

Ray v. Fairfax County Trust Company, 186 N. Y. S. 2d 347 57
Reilly v. Curtiss, 53 N. J. 677, 84 A. 199 ..... 26, 52

Reynolds v. Pegler, 123 F. Supp. 36, affirmed 223 F. 2d 429, cert. denied 350 U. S. 846 ..... 24, 40, 49
Robinson v. California, 370 U. S. 660 43
Roth v. U. S., 354 U. S. 476 ..... 22, 30

Sanders Associates, Inc. v. Galion Iron Works, 304 F. 2d 915 63
Scripto v. Carson, 362 U. S. 207 ..... 20, 27, 60, 61, 63, 65
Seaboard Ry. v. Hubbard, 142 Ala. 546 57
Sessoms Grocery Co. v. International Sugar Feed Co., 188 Ala. 232 56
Smyth v. Twin State Improvement Corporation, 116 Vt. 569, 80 A. 2d 664 63
Southern Ry. v. Bennett, 233 U. S. 80 42
Spanel v. Pegler, 160 F. 2d 619 50
Speiser v. Randall, 357 U. S. 513 49
Spry v. Pruitt, 256 Ala. 341, 54 So. 2d 701 44
Staub v. City of Baxley, 355 U. S. 313 58
St. Louis, etc. Ry. Co. v. Craft, 237 U. S. 648 42
St. Louis, etc. Ry. v. Williams, 251 U. S. 63 42
St. Mary's Oil Engine Company v. Jackson Ice & Fuel Company, 224 Ala. 152, 138 So. 834 56
Stromberg v. California, 283 U. S. 359 35
Sweeney v. Schenectady Union Publishing Company, 122 F. 2d 288, affirmed 316 U. S. 642 40

Terminal Oil Mill Co. v. Planters, etc. Co., 197 Ala. 429 56
Terminiello v. Chicago, 337 U. S. 1 ..... 34, 35
Thompson v. Louisville, 362 U. S. 199 47
Thompson v. Wilson, 224 Ala. 299, 140 So. 439 56
Travelers Health Association v. Virginia, 339 U. S. 643 ..... 61, 65

United Gas Pipeline Company v. Ideal Cement Company, 369 U. S. 134 ..... 26, 55
United Gas Public Service Company v. Texas, 303 U. S. 123 ..... 29, 47

Valentine v. Chrestensen, 316 U. S. 52 ..... 22, 30, 31
Vaughan v. Vaughan, 267 Ala. 117, 100 So. 2d 1 56

Washington Times Company v. Bonner, 86 F. 2d 836 .. 23, 38
Watts v. Indiana, 338 U. S. 49 48
Western Loan & Savings Company v. Butte, etc. Mining Company, 210 U. S. 368 57
Weston v. Commercial Advertisers, 184 N. Y. 479, 77 N. E. 660 ..... 25, 51
Whitney v. California, 274 U. S. 357 35
Wood v. Georgia, 370 U. S. 375 47
Wright v. Georgia, 373 U. S. 284 58
WSAZ v. Lyons, 254 F. 2d 242 ..... 62, 63

York v. Texas, 137 U. S. 15 ..... 55, 58

Constitutional Provisions and Statutes.

Constitution of United States, Amendment 1 2
Constitution of United States, Amendment 14 2
Constitution of United States, Amendment 7 ... 2, 42, 43, 48
Title 7, § 199 (1), Alabama Code 2, 3, 26, 62
Title 7, §§ 913-917, Alabama Code 28

Miscellaneous.

25 A. L. R. 2d 835 ..... 26, 57
31 A. L. R. 2d 258 ..... 26, 57
Chafee, Possible New Remedies for Errors in the Press, 60 Harvard L. Rev. 1 46
Chafee, Book Review, 62 Harvard L. Rev. 891 ..... 22, 38
Developments in the Law—Defamation, 69 Harvard L. Rev. 875 ..... 24, 26, 29, 40, 52
Developments in the Law—Federal Limitations on State Taxation of Interstate Business, 75 Harvard L. Rev. 953 60
Note, Exemplary Damages in the Law of Torts, 70 Harvard L. Rev. 517 39

Kurland, The Supreme Court, The Due Process Clause and The In Personam Jurisdiction of State Courts, 25 U. of Chicago L. Rev. 569 57
Mendelson, Learned Hand: Patient Democrat, 76 Harvard L. Rev. 322 49
I Messages and Papers of the Presidents, Joint Committee on Printing, 52nd Congress, p. 366 .....31, 32
Riesman, Democracy and Defamation, 42 Columbia L. Rev. 727 42
Restatement of Conflicts 57
3 Restatement of Torts 24, 26, 40, 50, 52
Statement of Mr. Justice Black and Mr. Justice Douglas, 31 F. R. D. 617 .....25, 45

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BRIEF FOR RESPONDENT.

Respondent adopts petitioner's statement of "Opinions Below" and "Jurisdiction."

QUESTIONS PRESENTED.

1. Does a newspaper corporation have a constitutionally guaranteed absolute privilege to defame an elected city official in a paid newspaper advertisement so that the corporation is immune from a private common law libel

judgment in a state court in circumstances where, because of the admitted falsity of the publication, the newspaper is unable to plead or prove state afforded defenses of truth, fair comment, privilege or retraction (to show good faith and eliminate punitive damages), and where the corporation has retracted the same false material for another admittedly "on a par" with the city official?

2. When the only claimed invasion of a corporation's constitutional rights is that a city official successfully sued it for damages in a private civil action for libel in a state court in circumstances described in Question 1, and when the corporation does not contend that the state trial proceedings have been unfair, has there been an abridgement of the corporation's constitutional rights under the First and Fourteenth Amendments?

3. Are libelous utterances in a paid newspaper advertisement within the area of constitutionally protected speech and press?

4. When an admittedly false newspaper advertisement published in circumstances described in Question 1 charges that city police massively engaged in rampant, vicious, terroristic and criminal actions in deprivation of rights of others, is a state court holding in a private common law libel action that such an utterance is libelous as a matter of state law—leaving to the jury the questions of publication, identification with the police commissioner, and damages—an infringement of the newspaper's constitutional rights?

5. When a paid newspaper advertisement published in circumstances described in Question 1 contains admittedly false charges described in Question 4 about police action in a named city, may this Court consistently with its decisions and the Seventh Amendment review on certiorari a state jury finding, in a trial concededly fair, that the

publication is "of and concerning" the city police commissioner whose name does not appear in the publication, and an award of general and punitive damages to him, when this state jury verdict embodied in a final state judgment has been approved by the state's highest appellate court?

6. May this Court consistently with its decisions and the Seventh Amendment re-examine facts tried by a state jury in a trial concededly fair, when those findings have been embodied in a final state judgment affirmed by the highest state appellate court, and when review is sought on assertions that the verdict is wrong and the general and punitive libel damages merely excessive?

7. When a foreign corporation makes a general appearance in a private state civil action against it, according to state law consistent with the majority view of all states, is there an adequate independent state ground as to jurisdiction over this foreign corporation?

8. Even if there had been no general appearance as described in Question 7, when a foreign newspaper corporation continuously and systematically gathers news by resident and transient correspondents, solicits advertising in person and by mail, and distributes its newspapers for sale in the forum state, and when some of these activities are incident to the cause of action in suit, has this foreign corporation sufficient contacts with the forum state so that suit against it is fair in accordance with decisions of this Court so explicit as to leave no room for real controversy?

STATUTES INVOLVED.

Statutes referred to in this brief are contained in an appendix hereto.

STATEMENT.

In the New York Times of March 29, 1960, there appeared a full-page advertisement, "warmly endorsed" by the four petitioners in No. 40, entitled, "Heed Their Rising Voices."[1] Charging generally "an unprecedented wave of error," the advertisement said of Montgomery:

> "In Montgomery, Alabama, after students sang 'My Country, 'Tis of Thee' on the State Capitol steps, their leaders were expelled from school, and truckloads of police armed with shotguns and tear-gas ringed the Alabama State College Campus. When the entire student body protested to state authorities by refusing to re-register, their dining hall was padlocked in an attempt to starve them into submission.
>
> . . . . . .
>
> "Again and again the Southern violators have answered Dr. King's peaceful protests with intimidation and violence. They have bombed his home almost killing his wife and child. They have assaulted his person. They have arrested him seven times—for 'speeding,' 'loitering' and similar 'offenses.' And now they have charged him with 'perjury'—a felony under which they could imprison him for ten years."

Respondent, police commissioner of Montgomery, asked $500,000 as damages for this libel from the New York Times and the four "warm endorsers."

After a lengthy hearing the trial court held on August 5, 1960, that the New York Times was amenable to suit in Alabama. It had made a general appearance the court found. And, moreover, its business activities in Alabama, some of which had given rise to the cause of action, were sufficient contacts under due process standards to permit

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[1] App. B of Petitioner's brief, p. 97.

service on a Times string correspondent residing in Alabama, and on the Secretary of State under the Alabama Substituted Service Statute[2] (R. 49-57).

After its demurrers had been overruled (R. 108) the Times filed six separate pleas to the complaint (R. 99-105). Although truth regardless of motive is a complete defense to a libel suit in Alabama (see infra), the Times and its co-defendants filed no plea of truth. Although privilege and fair comment are defenses in Alabama in appropriate circumstances (see infra), the Times and its co-defendants did not plead these defenses. At the conclusion of the trial a jury returned a verdict against all defendants for $500,000, and the trial court entered a judgment against all defendants in this amount.[3] Petitioner does not assert here any due process defects in these trial proceedings, and does not attack the motives and conduct of the jury.

The Times filed a motion for new trial, which was overruled (R. 970); the petitioners in No. 40 filed motions for new trial, but allowed them to lapse (R. 984, 998, 1013, 1028).

The Alabama Supreme Court affirmed the judgment as to all defendants (R. 1180).

The Times complains in this Court: (1) The holdings of the Alabama courts that the publication was libelous per se and the jury verdict that it was "of and concerning" respondent abridged its guaranties under the 1st and 14th Amendments, and (2) it was not amenable to suit in Alabama.

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[2] Title 7, § 199 (1), Code of Alabama. The Times has conceded throughout adequate notice and opportunity to defend.

[3] Of course, this joint judgment is not collectible more than once. The facts giving rise to liability of petitioners in No. 40 will be related in a separate brief.

I.

Merits.

Since the Times has told this Court that the whole libel rests on two discrepancies—mere "exaggerations or inaccuracies"[4] in the course of an "impersonal"[5] discussion "plainly" not meant as an attack on any individual,[6] respondent will state this case.[7]

This lawsuit arose because of a wilful, deliberate and reckless attempt to portray in a full-page newspaper advertisement, for which the Times charged and was paid almost $5,000, rampant, vicious, terroristic and criminal police action in Montgomery, Alabama, to a nationwide public of 650,000. The goal was money-raising. Truth, accuracy and long-accepted standards of journalism were not criteria for the writing or publication of this advertisement. The defamatory matter (quoted R. 580-81) describes criminal police action because some college students innocently sang "My Country 'Tis of Thee" from the Alabama State Capitol steps. The innocent singers were expelled

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[4] Brief, p. 33.

[5] Brief, p. 32.

[6] Ibid.

[7] Respondent, accordingly, will not dignify beyond this comment the "statement" contained in the briefs of the friends of the Times. They are literally second editions of the advertisement and do not even purport to be confined to accurate summaries of the record.

The American Civil Liberties Union Brief, for example, draws most of its statement from newspaper articles, offered by the Times on its motion for new trial, and excluded below. The correctness and propriety of the ruling is not challenged. The brief simply cites the material as evidence anyway. Such practice presumably fosters the "fair trials" to which the organization is "devoted" (Brief, pp. 1 and 2). The other *amici* briefs are consumed with unrelated cases, entirely outside the record, and with inaccurate and incomplete characterizations of and quotations from a scant fraction of the testimony in this case.

from school; police ringed their campus by truckloads armed with shotguns and tear gas;[8] and their dining hall was padlocked to starve the students into submission. All statements charge violation of the students' rights.

The Times is not candid when it tells this Court (Brief p. 7) that "the only part" of the foregoing statement "that Respondent thought implied a reference to him was the assertion about 'truckloads of police.'" Respondent made entirely clear that he considered the padlocking charge—and all other charges except expulsion—as applicable to him as well (R. 716). The Times is also absolutely inaccurate when it tells this Court that respondent's evidence "consisted mainly" (Brief p. 7) of a story by Sitton and a report by McKee. Respondent's evidence also included the Times' answers to interrogatories; respondent's own testimony, and that of his numerous witnesses; the testimony of all of the Times' trial witnesses; the statements and judicial admissions of its attorneys; and the testimony of John Murray who testified for the individual petitioners.

The advertisement in another paragraph charges that the perpetrators of the foregoing alleged barbarisms were the same persons who had intimidated Martin Luther King; bombed his home; assaulted his person; and arrested him. All statements charge criminal conduct. Although the Times' brief tells this Court that the pronoun "they" does not point to respondent, and that such a jury finding is "absurd" (Brief p. 33), the jury was able to make the connection from the Times' own witness, Gershon Aaronson. He conceded that the word "they" as it appeared repeatedly in the quotation in the ad "refers to the same

[8] The Times apparently hopes to de-emphasize the ad's false allegations that the police were armed with shotguns and tear gas. It describes the ad as speaking of "truckloads of armed police . . ." (Brief, pp. 5 and 62. See also p. 8).

persons" (R. 745).[9] Accordingly, the same police and the same police commissioner committed or condoned these alleged acts. And a jury unanimously agreed with Aaronson.

In a vain attempt to transfer these devastating statements from the constitutionally unprotected area of socially useless libel, where they belong, to the arena of constitutionally protected speech, where they obviously have no place, the Times and its friends employ various soothing phrases to describe the advertisement. It is called "political expression" and "political criticism" (pp. 29 and 30); "public men" (p. 41); "the daily dialogue of politics" (p. 50); "a critique of government as such"; "criticism of official conduct" and "of the government" (pp. 30 and passim); "the most impersonal denunciation of an agency of government" (p. 50); a "recital of grievances and protests against claimed abuse dealing squarely with the major issue of our time" (pp. 31 and 57); "an expression which is merely wrong in fact with denigrating implications" (p. 54); an "appeal for political and social change" (A. C. L. U. brief, p. 13); a "critique of attitude and method, a value judgment and opinion" (A. C. L. U. brief, p. 29).

But the ordinary, unsophisticated reader of this ad was bound to draw the plain meaning that such shocking conditions were the responsibility of those charged with the administration of the Montgomery Police Department—respondent and the other two city commissioners. Any other conclusion is impossible. The Times itself can suggest no other reference, except to the police generally, and police are under the direct control and supervision of respondent. Indeed, the Times brief (p. 44) characterizes

[9] The Times argues here, remarkable to say, that the jury should have disregarded Aaronson's testimony, because another witness, Redding, was *not* interrogated on the point (Brief, p. 17).

the ad as "criticism of an elected political official . . ." and observes that this official should be hardy enough to take it without suing for libel.

A description of such conduct, at war with basic concepts of decency and lawful government, inevitably evokes contempt, indignation, and ridicule for the person charged with the administration of police activities in Montgomery. And obviously this was the precise intent of the authors of the advertisement. One of them, John Murray, so testified.[10]

Significantly, none of the Times' witnesses, and none of the petitioners in No. 40, all of whom testified, presented any evidence designed to show that the statements from the ad were true. Certainly, the individual petitioners in No. 40, two of whom lived in Montgomery, had no reason to withhold testimony harmful to respondent.

The reference to respondent as police commissioner is clear from the ad. In addition, the jury heard the testimony of a newspaper editor (R. 602, et seq.); a real estate

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[10] "Q. (After reading the first paragraph quoted in the complaint) Was that the way that paragraph was when you first got it with the memorandum or did you give it that added touch for appeal?

"A. Well, it would be a little difficult at this time to recall the exact wording in the memorandum but the sense of what was in the memorandum was certainly the same as what is in here. We may have phrased it a little differently here and there.

"Q. I see. Your purpose was to rev it up a little bit to get money, I take it.

"A. Well, our purpose was to get money and to make the ad as—to project it in the most appealing form from the material we were getting.

"Q. Whether it was accurate or not really didn't make much difference, did it?

"A. Well, that did not enter the—it did not enter into consideration at all except we took it for granted that it was accurate—we took it for granted that it was accurate—they were accurate—and if they hadn't been—I mean we would have stopped to question it. I mean we would have stopped to question it—We had every reason to believe it" (R. 814-815).

and insurance man (R. 613, et seq.); the sales manager of a men's clothing store (R. 634, et seq.); a food equipment man (R. 644, et seq.); a service station operator (R. 649, et seq.); and the operator of a truck line for whom respondent had formerly worked (R. 662, et seq.). Each of these witnesses stated that he associated the statements with respondent, and that if he had believed the statements to be true, he would have considered such conduct reprehensible in the extreme.[11]

Unless the Times is asking this Court to assume the functions of a jury and to weigh the credibility of this relevant testimony, nothing could be more irrelevant than the time and place of the witnesses' first inspection of the ad. Even so, the Times has had to adjust the testimony to make its dubious point,[12] and it seems to forget that all of its witnesses were its own employees.

Undoubtedly the demonstrable falsity of the statements prevented pleas of truth or privilege or fair comment. Indeed, the Times published a retraction of the same paragraphs for Governor Patterson on May 16, 1960 (R. 596 and 1958-1961):

> "Since publication of the advertisement, The Times made an investigation and consistent with its policy

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[11] One stated, for example: "I don't think there is any question about what I would decide. I think I would decide that we probably had a young Gestapo in Montgomery" (R. 646).

[12] For example, Blackwell testified (R. 619): "He called me into his office and showed me this ad and at that time I indicated that I had seen the ad before but I don't remember just where and under what circumstances . . ."

Price testified: ". . . I saw copies of the two paragraphs myself prior to that time" (R. 648).

Respondent's counsel himself asked Parker whether he had seen the ad "before in my office" (R. 649) but not whether this was the first occasion; and counsel for the Times did not cross-examine on the point, presumably because its counsel had also talked to Parker before the trial (R. 651).

of retracting and correcting any errors or misstatements which may appear in its columns, herewith retracts the two paragraphs complained of by the Governor."

The Times asked its Montgomery string correspondent, McKee, for an investigation. On April 14, 1960, five days before suit was filed, McKee advised that the statements in the first quoted paragraph of the ad were false; and that King had been arrested twice by the Montgomery police for loitering and speeding and twice by the Sheriff's office for violation of the State boycott law and on charge of income tax falsification—a charge on which he was subsequently acquitted. Nevertheless, the Times, instead of retracting, wrote respondent that with the exception of the padlocking statement the rest of the quoted material was "substantially correct" (R. 589).

Later the Times directed another investigation by its regional correspondent, Claude Sitton. While the Times now speaks in this Court of "discrepancies" and "inaccuracies" in two instances, Sitton reported on May 4, 1960, that the first quoted paragraph of the advertisement "appears to be virtually without any foundation" (R. 594). There was no suggestion of involvement of respondent or any other city commissioner, or public employee under their charge, in the matters in the second quoted paragraph.

The Times then retracted for Governor Patterson, but not for respondent. The Times attempted to explain its inconsistency:

> "The defendant . . . felt that on account of the fact that John Patterson held the high office of Governor of the State of Alabama and that he apparently believed that he had been libeled by said advertisement in his capacity as Governor of the State of Alabama, the defendant should apologize" (R. 595-596).

When confronted with this answer to interrogatories, Harding Bancroft, then secretary of The New York Times, could give no reason for the different treatment of Governor Patterson and respondent. They were "on a par." But there was a retraction for Patterson and not for respondent (R. 779).[13]

Undisputed trial testimony showed that respondent and the other commissioners and the Montgomery police had nothing to do with the King bombings; that a city detective had helped dismantle a live bomb which had been thrown on King's front porch (R. 585); and that the department had exerted extraordinary efforts to apprehend the persons responsible (R. 686-687). The occurrence of this event before respondent took office simply compounds the libelous nature of this advertisement which seeks to portray such matters as current actions which "they" took. The ordinary reader, chronologically unsophisticated, would clearly associate the acts with the current city government.

Another police officer testified without contradiction that no one had assaulted King when he had been arrested for loitering outside the courtroom (R. 692-693).

Frank Stewart, State Superintendent of Education, testified without contradiction that students had not been ex-

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[13] The Times brief, in its lengthy attempt to explain its inconsistency (pp. 21-22), presents an incomplete and inaccurate summary of Bancroft's testimony. It omits the following (R. 779):

"Q. Is there anything contained in this sentence in the Interrogatories that I just read to you which differentiates in any manner the position of Governor Patterson in his suit with Commissioner Sullivan in the present suit?

"A. As I read the thing, the answer is no.

"Q. They are put on a par, aren't they, Governor Patterson and this Plaintiff?

"A. Yes.

"Q. But there was a retraction for Governor Patterson and there was no retraction for this Plaintiff. That is correct, isn't it?

"A. That is correct."

pelled from school for singing on the capitol steps (R. 700).

The uncontroverted testimony of falsity was so overwhelming that counsel for the Times repeatedly brought out from witnesses that the statements quoted from the ad were not true. Moreover, he stated that truth was not in issue in the case because it had not been pleaded (A compendium of counsel's statements is in Appendix B of the brief in opposition, pp. 48-52). Counsel would not and could not have made such statements if the quoted portions of the ad had been true or if they had contained only a few "discrepancies" or "exaggerations."

Undeterred, however, in the teeth of these judicial admissions, Harding Bancroft maintained to the end an equivocal position about the correctness of the ad, with the exception of the padlocking statement.[14] The Times' brief, on the contrary, candidly recites (pp. 62-65) a chronicle

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[14] When asked whether the Times took the position that the ad's statements, with this exception, were "substantially correct," Bancroft first said: "I think it is a pretty hard question to answer" (R. 781). Then, the Times . . . "doesn't know anything more than what is set forth in these two responses which our stringer and correspondent there, which are annexed to the Answers to the Interrogatories and we don't have any additional knowledge to that" (R. 782). Next: "I really think I have to answer the question by saying I don't know" (R. 782). Then: "[I]t is awfully difficult to define what The Times thinks," but The Times' lawyers had seemed to indicate on April 15, 1960, that the statements were substantially correct (R. 784). He concluded (R. 785):

> "I find it terribly difficult to be able to say that The Times, as such, believes something is true or is not true. Now, all I can tell you is what the sources of The Times' knowledge are, and the sources are The Times' knowledge—the complete sources as far as I know, are the two annexes attached to the Answers to the Interrogatories. Now, if you asked me would I use the words 'substantially correct,' now, I think I probably would, yes. The tenor of the content, the material of those two paragraphs in the ad which have been frequently read here are not substantially incorrect. They are substantially correct. Now, what sort of words I can use to give you an answer that would satisfy you, I don't know."

of the ad's falsities in addition to the padlocking statement.

Because of this testimony, when the Times six months before had retracted the same statements on the basis of the same investigation as "errors and misstatements" (R. 595-596, 1958-1961), the court below characterized Bancroft's performance as "cavalier ignoring of the falsity of the advertisement" which surely impressed the jury "with the bad faith of the Times, and its maliciousness inferable therefrom" (R. 1178). The Times is absolutely incorrect when it argues that this statement of the Court was based upon the selected portion of Bancroft's testimony excerpted on pages 21 and 22 of its brief.

Sullivan himself testified that the matters contained in the ad were false (R. 705-709); that the statements reflected "upon my ability and integrity, and certainly it has been established here that they are not true" (R. 713).

The bombing statement "referred to me and to the Police Department and the City Commissioners" (R. 718). Similarly, the other matters contained in the second quoted paragraph of the ad related to him "by virtue of being Police Commissioner and Commissioner of Public Affairs."

When asked on cross-examination whether he felt that the ad had a "direct personal reference" to him, his answer was, and it is the simple answer which any normal reader of the ad would give:

> "It is my feeling that it reflects not only on me but on the other Commissioners and the community. . . . When it describes police action, certainly I feel it reflects on me as an individual" (R. 724).

Moreover:

> "I have endeavored to try to earn a good reputation and that's why I resent very much the state-

ments contained in this ad which are completely false and untrue" (R. 722).

The circumstances under which this ad was cleared for publication show a striking departure from the Times' usual meticulous screening process. So that it will print only what is "fit to print," the Times has codified an elaborate set of "advertising acceptability standards" (R. 597-601), designed "to exclude misleading, inaccurate, and fraudulent advertisements and unfair competitive statements in advertising. The chief purpose of this policy of The Times is to protect the reader and to maintain the high standards of decency and dignity in its advertising columns which The Times has developed over the years."

To be as charitable as possible, it is remarkable that no person connected with The Times investigated charges that as part of "a wave of terror," public officials in Montgomery, because students sang "My Country 'Tis of Thee" from the Capitol steps, expelled the students from school; ringed their campus with truckloads of police armed with shotguns and tear gas; padlocked dining halls to starve them into submission; and thereby maintained continuity with earlier days in which they had bombed King's home, assaulted his person, and arrested him on baseless charges.

Over sixty names appeared on the ad; none of these persons was contacted. A regional correspondent in Atlanta, who the Times admits had written news reports about racial difficulties in Montgomery, was not questioned. The Times had a string correspondent in Montgomery. It directed him to give an immediate report on the demand for retraction. But he was not asked for prior information or investigation.

In its answer to interrogatories, the Times specified sixteen contemporaneous news stories of its own as "re-

lating to certain of the events or occurrences referred to in the advertisement" (R. 586). Aaronson, Redding, and Bancroft—the three Times witnesses—had never bothered to look at any of this news material before publishing the ad.

Aaronson, an employee on the national advertising staff, who first received the ad, testified that he did not read it (R. 741), but simply "scanned it very hurriedly" (R. 742).

Because he knew nothing which would lead him to believe that these monstrous statements were false (R. 758), Vincent Redding, head of the Advertising Acceptability Department, did not check with any of the signers of the ad; or with the regional correspondent in Atlanta; or with the string correspondent in Montgomery; or with the sixteen newspaper stories on file in his office (R. 763-765):

> "Q. Mr. Redding, wouldn't it be a fair statement to say that you really didn't check this ad at all for accuracy?
>
> "A. That's a fair statement, yes" (R. 765).

One wonders whether the performance of Messrs. Aaronson, Redding and Bancroft inspired the American Civil Liberties Union comment that the Times had suffered "liability without fault" (Brief, p. 26), and the Washington Post evaluation that ". . . the undisputed record facts disclose that the advertisement was published under circumstances which, by no stretch of the imagination could be characterized as anything other than complete good faith" (Brief, p. 6).

Testimony of John Murray, one of the authors of the ad, and erstwhile Hollywood "scenarist" and Broadway lyricist (R. 815), describing the manner in which the ad was composed, has been quoted previously (Footnote 10, *supra*).

Thus, this "appealing" congeries of monstrous and now undefended falsehoods was sent to The New York Times. Upon payment of almost five thousand dollars, it was published without any investigation as a full-page advertisement in The New York Times of March 29, 1960. Six hundred and fifty thousand copies of it circulated to the nation as part of "All the news that's fit to print." And its purveyors sat back to await the financial return on their investment in "free speech".

II.

Jurisdiction.

General Appearance. Petitioner, by moving to dismiss the action because the Alabama court was said to have no jurisdiction of the subject matter, made a general appearance in this case and thereby consented to the jurisdiction of the Alabama courts over its corporate person. This was the holding of both courts below. In addition, the trial court held that by bringing a mandamus action in the Supreme Court of Alabama unrelated to questions of personal jurisdiction, the Times had compounded its general appearance (R. 49-51). The holdings below, as will be demonstrated, accord with Alabama cases as well as those in a majority of the states.

The Times calls this general appearance "involuntary" (Brief, p. 75). But the Times in its brief in the Alabama Supreme Court (p. 54) said:

> "Accordingly, while the motion made it clear that the only grounds for the motion were the defects in the mode of service, the prayer asserted the consequences of these defects—a lack of jurisdiction not only over the person but also over the subject matter."

And the Times still makes the subject matter argument in this Court (Brief, p. 73):

> "Hence a contention that the statute is inapplicable or invalid as applied goes, in this sense, to jurisdiction of the cause as well as jurisdiction of the person."

Validity of service of process on The New York Times. The courts below held that service on the string correspondent, McKee, and on the Secretary of State were valid. The trial court held that the Times had been sued on a cause of action "incident to" its business in Alabama (R. 55); and the "manifold contacts which The Times maintains with the State of Alabama" make it amenable to this process and suit in the Alabama courts, commenced by service on McKee and on the Secretary of State, "regardless of its general appearance" (R. 51). The trial court found:

> ". . . an extensive and continuous course of Alabama business activity—news gathering; solicitation of advertising; circulation of newspapers and other products. These systematic business dealings in Alabama give The Times substantial contact with the State of Alabama, considerably in excess of the minimal contacts required by the Supreme Court decisions. . . . The Times does business in Alabama" (R. 56-57).

The Alabama Supreme Court affirmed on this point, after extensive findings regarding the business activities of the Times in Alabama (R. 1140-1147). It adopted, as had the trial court, the test of **Consolidated Cosmetics v. D-A Publishing Company**, 186 F. 2d 906, 908 (7th Cir. 1951):

> "The functions of a magazine publishing company, obviously, include gathering material to be printed, obtaining advertisers and subscribers, printing, selling and delivering the magazines for sale. Each of these,

we think, constitutes an essential factor of the magazine publication business. Consequently if a non-resident corporation sees fit to perform any one of those essential functions in a given jurisdiction, it necessarily follows that it is conducting its activities in such a manner as to be subject to jurisdiction."

The court below concluded (R. 1149-1150):

"The evidence shows that The Times sent its papers into Alabama, with its carrier as its agent, freight prepaid, with title passing on delivery to the consignee. See Tit. 57, Sec. 25, Code of Alabama 1940; 2 Williston on Sales, Sec. 279 (b), p. 90. Thence the issue went to newsstands for sale to the public in Alabama, in accordance with a long standing business practice.

"The Times or its wholly owned advertising subsidiary, on several occasions, had agents in Alabama for substantial periods of time soliciting, and procuring in substantial amounts advertising to appear in The Times.

"Furthermore, upon the receipt of the letter from the plaintiff demanding a retraction of the matter appearing in the advertisement, The Times had its string correspondent in Montgomery, Mr. McKee, investigate the truthfulness of the assertions in the advertisement. The fact that Mr. McKee was not devoting his full time to the service of The Times is 'without constitutional significance.' Scripto, Inc. v. Carson, Sheriff, et al., 362 U. S. 207."

Moreover, the court below found (R. 1151):

"In the present case the evidence shows that the publishing of advertisements was a substantial part of the business of The Times, and its newspapers were regularly sent into Alabama. Advertising was solicited

in Alabama. Its correspondent McKee was called upon by The Times to investigate the truthfulness or falsity of the matters contained in the advertisement after the letter from the plaintiff. The acts therefore disclose not only certain general conditions with reference to newspaper publishing, but also specific acts directly connected with, and directly incident to the business of The Times done in Alabama."

The exhaustive findings of fact contained in the opinions of both Alabama courts are fully substantiated in the record, and are not challenged in the Times Brief. In a qualitative sense, the test of **International Shoe Co. v. Washington**, 326 U. S. 310, 319-320, these decisions below were clearly correct. The Times from 1956 through April, 1960, conducted an extensive and continuous course of business activity in Alabama. The annual revenue was over twice as great as the $42,000 which this Court found sufficient to establish adequate Florida contacts in **Scripto v. Carson**, 362 U. S. 207.

SUMMARY OF ARGUMENT.

I.

The commercial advertisement in suit sought to, and did, portray criminal and rampant police state activity—an "unprecedented wave of terror"—resulting from students singing "My Country 'Tis of Thee" from the state capitol steps. This falsely alleged "wave of terror" against innocent persons was said to include expulsion from school; ringing of a college campus with truckloads of police armed with shotguns and tear gas; padlocking of the dining hall to starve protesting students into submission; and the arrest of Martin Luther King for loitering and speeding by those who had also bombed his home, assaulted his person and indicted him for perjury. The ad did not name respondent, but massive, terroristic and criminal acts of the police carry the sure meaning to the average, reasonably intelligent reader that the police activity is that of the police commissioner.

A. Alabama libel laws provided petitioner with the absolute defense of truth and with the privilege of fair comment. Petitioner did not plead or attempt to prove truth or fair comment. Its attorneys suggested in open court that the defamatory matter was not true and would not be believed, and that truth was not in issue. The Times itself, in a contemporaneous retraction for another person whom it considered to be "on a par" with respondent, admitted that the material in the ad was erroneous and misleading.

Alabama law provides for untruthful and unprivileged defamers an opportunity to retract and thereby to eliminate all damages except special. Though the Times retracted for another "on a par", it refused to do so for respondent.

The Times makes no claim that it was denied a fair and impartial trial of this libel action, and raises no question of procedural due process.

In these circumstances, no provision of the Constitution of the United States confers an absolute immunity to defame public officials. On the contrary, this Court has repeatedly held that libelous utterances are not protected by the Constitution. **Beauharnais v. Illinois**, 343 U. S. 250; **Near v. Minnesota**, 283 U. S. 697, 715; **Konigsberg v. State Bar of California**, 366 U. S. 36, 49-50; **Roth v. U. S.**, 354 U. S. 476, 483; **Chaplinsky v. New Hampshire**, 315 U. S. 568, 571-572; **Barr v. Matteo**, 360 U. S. 564; **Farmers Union v. WDAY, Inc.**, 360 U. S. 525; and **Pennekamp v. Florida**, 328 U. S. 331, 348-349. Historical commentary on "freedom of the press" accords. See, Thomas Jefferson to Abigail Adams in 1804; Thomas Jefferson's Second Inaugural Address (1805); Chafee, Book Review, 62 Harvard L. Rev. 891, 897, 898 (1949). Moreover, commercial advertisements are not constitutionally protected as speech and press. **Valentine v. Chrestensen**, 316 U. S. 52, 54; and **Breard v. City of Alexandria**, 341 U. S. 622, 643. Because such libelous utterances are not constitutionally protected speech, "it is unnecessary, either for us or for the state courts, to consider the issues behind the phrase 'clear and present danger.'" **Beauharnais v. Illinois**, 343 U. S. 250, 266.

B. It is fantasy for petitioner to argue that the ad which falsely charged respondent, as police commissioner, with responsibility for the criminal and rampant "unprecedented wave of terror" is "the daily dialogue of politics" and mere "political criticism" and "political expression." If the Times prevails, any false statement about any public official comes within this protected category. The absolute immunity would cover false statements that the Secretary of State had given military secrets to the en-

emy; that the Secretary of the Treasury had embezzled public funds; that the Governor of a state poisoned his wife; that the head of the public health service polluted water with germs; that the mayor and city council are corrupt; that named judges confer favorable opinions on the highest bidder; and that a police commissioner conducted activities so barbaric as to constitute a wave of terror.

C. Since the Times did not invoke Alabama defenses of truth, fair comment or privilege, the question of the constitutional adequacy of these defenses is entirely academic. Nevertheless, Alabama libel law conforms to constitutional standards which this Court has repeatedly set and to the libel laws of most states. "Only in a minority of states is a public critic of Government even qualifiedly privileged where his facts are wrong." **Barr v. Matteo**, 360 U. S. 564, 585 (dissenting opinion of Chief Justice Warren). The constitution has never required that states afford newspapers the privilege of leveling false and defamatory "facts" at persons simply because they hold public office. The great weight of American authority has rejected such a plea by newspapers. **Burt v. Advertiser Company**, 154 Mass. 238, 28 N. E. 1, 4 (opinion by Judge, later Mr. Justice Holmes); **Post Publishing Company v. Hallam**, 59 F. 530, 540 (6th Cir. 1893) (opinion by Judge, later Mr. Chief Justice Taft); **Washington Times Company v. Bonner**, 86 F. 2d 836, 842 (D. C. Cir. 1936); **Pennekamp v. Florida**, 328 U. S. 331, 348-349: "For such injuries, when the statements amount to defamation, a judge has such remedy in damages for libel as do other public servants."

D. Alabama's definition of libel *per se* as a false publication which tends to injure the person defamed in his reputation, which brings him into public contempt as a public official, or which charges him with a crime, is a

familiar one and accords with that of most states. This Court approved it in **Beauharnais v. Illinois**, 343 U. S. 250, 257, n. 5, citing **Grant v. Reader's Digest**, 151 F. 2d 733, 735 (2d Cir. 1945), opinion by Judge Learned Hand; **Hogan v. New York Times**, 313 F. 2d 354, 355 (2d Cir. 1963). The presumption of general damages from libel *per se* is the majority rule throughout the country. **Developments in the Law—Defamation**, 69 Harvard L. Rev. 875 at 934 and 937; 3 **Restatement of Torts**, § 621, pp. 313-316.

E. In Alabama, as elsewhere, punitive damages and general damages, where there has been no retraction, are permitted, and the jury is given broad discretion in fixing the amount of the award. **Reynolds v. Pegler**, 123 F. Supp. 36, 38, affirmed 223 F. 2d 429 (2d Cir.), cert. den. 350 U. S. 846; **Faulk v. Aware, Inc.**, 231 N. Y. S. 2d 270; and **Beauharnais v. Illinois**, 343 U. S. 250, 266. In assessing punitive damages, the jury may properly consider the nature and degree of the offense, as well as the higher moral consideration that these damages may deter such illegal practices in the future. The award in this case is but a fraction of two recent libel awards in the **Faulk** case and by a Georgia Federal jury of more than three million dollars, with punitive damages alone of two and one-half million dollars and three million dollars respectively.

This Court has always considered itself barred by the Seventh Amendment of the Constitution from setting aside state and federal damage awards as inadequate or excessive. **Chicago, B. & Q. v. Chicago**, 166 U. S. 226, 242-243; **Fairmount Glass Works v. Cub Fork Coal Co.**, 287 U. S. 474; **Neese v. Southern Ry.**, 350 U. S. 77. Many other cases are cited in this brief.

There is no constitutional infirmity in Alabama procedure which preserves the jury's long-standing common

law right to return a general verdict. **Statement of Mr. Justice Black and Mr. Justice Douglas**, 31 F. R. D. 617 at 618-619.

In setting punitive damages, the jury could properly contrast the judicial admissions of the Times' attorneys that the advertisement was false and the Times' retraction of the same matter for another person as misleading and erroneous, with the trial testimony of the secretary of the corporation that the advertisement was substantially correct with the exception of one incident described in the ad.

II.

It is patently frivolous for the Times to argue that no ordinary person of reasonable intelligence could read the advertisement in suit as referring to the Montgomery police commissioner. Certainly the jury is not required as a matter of law to hold that the ad is not of and concerning respondent. Its finding is entitled to all of the safeguards of the Seventh Amendment. **Gallick v. B. & O. R. Co.**, 372 U. S. 108; **Chicago B. & Q. R. Co. v. Chicago**, 166 U. S. 226 at 242-243; and **Fairmount Glass Works v. Cub Fork Coal Co.**, 287 U. S. 474. While the ad's reference is clear enough, the jury heard witnesses who associated respondent with its false allegations. **Hope v. Hearst Consolidated Publications**, 294 F. 2d 681 (2d Cir.), cert. denied 368 U. S. 956; **Chagnon v. Union Leader Corp.**, 103 N. H. 426, 174 A. 2d 825, 831-832, cert. denied 369 U. S. 830.

This Court in **Beauharnais v. Illinois**, 343 U. S. 250, and courts generally, have held that a plaintiff need not be named in a defamatory publication in order to have a cause of action for libel. **Cosgrove Studio, Inc. v. Pane**, 408 Pa. 314, 182 A. 2d 751, 753; **Hope v. Hearst Consolidated Publications**, supra; **Nieman-Marcus v. Lait**, 13 F. R. D. 311 (S. D. N. Y. 1952); **National Cancer Hospital v. Confidential, Inc.**, 136 N. Y. S. 2d 921; **Weston v. Com-**

mercial Advertisers, 184 N. Y. 479, 77 N. E. 660; Bornmann v. Star Co., 174 N. Y. 212, 66 N. E. 723; Chapa v. Abernethy (Tex. Civ. App.), 175 S. W. 165; Gross v. Cantor, 270 N. Y. 93, 200 N. E. 592; Fullerton v. Thompson, 119 Minn. 136, 143 N. W. 260; Children v. Shinn, 168 Iowa 531, 150 N. W. 864; Reilly v. Curtiss, 53 N. J. 677, 84 A. 199; 3 Restatement of Torts, § 564 (c), p. 152; and Developments in the Law—Defamation, 69 Harvard L. Rev. 894 et seq.

III.

A. The courts below held that under Alabama practice the Times appeared generally in the action because it objected to jurisdiction of the subject matter as well as to jurisdiction of the person. This holding, which accords with the majority rule (25 A. L. R. 2d 835 and 31 A. L. R. 2d 258) is an adequate independent state ground as to jurisdiction over the Times which bars review of that question. Herb v. Pitcairn, 324 U. S. 117, 125-126; Murdock v. Memphis, 20 Wall. 590, 626; Fox Film Corporation v. Muller, 296 U. S. 207, 210; Minnesota v. National Tea Company, 309 U. S. 551, 556-557. A state court's interpretation of its own law is binding here. Fox River Paper Company v. Railroad Commission, 274 U. S. 651, 655; Guaranty Trust Company v. Blodgett, 287 U. S. 509, 513; United Gas Pipeline Company v. Ideal Cement Company, 369 U. S. 134.

B. Even if the Times had not made a general appearance in this case, effective service of process on a Times string correspondent residing in Alabama and on the Secretary of State of Alabama under a Substituted Service Statute, Title 7, § 199 (1), Alabama Code of 1940 as amended, is based on decisions of this Court so explicit as to leave no room for real controversy. Suit against the Times in Alabama accorded with traditional concepts of fairness

and orderly administration of the laws. **International Shoe Company v. Washington**, 326 U. S. 310, 319; **McGee v. International Insurance Company**, 355 U. S. 220; **Scripto v. Carson**, 362 U. S. 207; **Travelers Health Association v. Virginia**, 339 U. S. 643. The Times maintained three resident string correspondents in Alabama, and, since 1956, carried on an extensive, systematic and continuous course of business activity there, including news gathering, solicitation of advertising and circulation of newspapers and other products. It performed all of the functions of a newspaper outlined in **Consolidated Cosmetics v. D. A. Publishing Company**, 186 F. 2d 906, 908 (7th Cir. 1951). Its business activity produced more than twice the revenue which Scripto derived from Florida (see **Scripto v. Carson**, 362 U. S. 207), and its regular employees combined their efforts with those of independent dealers to produce this result.

It would be manifestly unfair to make respondent bring his libel suit in New York instead of in his home state where the charges were likely to harm him most. See Justice Black's dissenting opinion in **Polizzi v. Cowles Magazines**, 345 U. S. 663, 667.

When other business corporations may be sued in a foreign jurisdiction, so may newspaper corporations on similar facts. This Court has refused newspaper corporations special immunity from laws applicable to businesses in general. **Mabee v. White Plains Publishing Co.**, 327 U. S. 178, 184 (Fair Labor Standards Act); **Associated Press v. N. L. R. B.**, 301 U. S. 103 (National Labor Relations Act); and **Lorain Journal Company v. United States**, 342 U. S. 143 (Anti-trust laws).

ARGUMENT.

I.

The Constitution Confers No Absolute Immunity to Defame Public Officials.

The New York Times, perhaps the nation's most influential newspaper, stooped to circulate a paid advertisement to 650,000 readers—an advertisement which libeled respondent with violent, inflammatory, and devastating language. The Times knew that the charges were uninvestigated and reckless in the extreme. It failed to retract for respondent with subsequent knowledge of the falsity of the material in the advertisement. Yet it retracted as misleading and erroneous the same defamatory matter for another "on a par."

Petitioner was unable to plead truth; or fair comment; or privilege. Alabama provides these classic defenses so that the press may be free within the rubric of its libel laws.[15] Since petitioner did not invoke these Alabama defenses, its belated attack on their constitutional adequacy is hollow and entirely academic. Nevertheless, the Alabama law of libel conforms to constitutional standards which this Court has repeatedly set and to the libel laws of most states. "Only in a minority of states is a public critic of Government even qualifiedly privileged where his

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[15] Substantial truth in all material respects is a complete defense if specially pleaded. *Ferdon v. Dickens*, 161 Ala. 181, 49 So. 888; *Kirkpatrick v. Journal Publishing Company*, 210 Ala. 10, 97 So. 58; *Alabama Ride Company v. Vance*, 235 Ala. 263, 178 So. 438.

Privilege and fair comment, too, are defenses, if specially pleaded. *Ferdon v. Dickens*, supra; *W. T. Grant v. Smith*, 220 Ala. 377, 125 So. 393.

A retraction completely eliminates punitive damages. Title 7, Sections 913-917, Alabama Code (App. A, p. 67).

facts are wrong."[16] Moreover, "[t]he majority of American courts do not give a privilege to a communication of untrue facts, or to a comment based on them, even though due care was exercised in checking their accuracy."[17] *A fortiori* there is no such privilege where there was no check whatever. (See Aaronson, Redding and Bancroft testimony).

The Times' trial attorneys conceded that truth was not in issue; and made plain to the jury that the material was so patently false as to be unbelievable in the community. No defendant attempted to introduce testimony to substantiate the charges. The Times does not claim that it was denied a fair and impartial trial of the libel action. The petition raises no question of procedural due process.

> "This cause was tried in the courts of [the state] in accordance with regular court procedure applicable to such cases. The facts were submitted to a jury as provided by the constitution and laws of that State, and in harmony with the traditions of the people of this nation. Under these circumstances, no proper interpretation of the words 'due process of law' contained in the Fourteenth Amendment can justify the conclusion that appellant has been deprived of its property contrary to that 'due process.'"[18]

Libelous Utterances Have No Constitutional Protection.

The Times does not seek review of a federal question—substantial or otherwise. For libelous utterances have never been protected by the Federal Constitution. Through-

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[16] Chief Justice Warren, dissenting in *Barr v. Matteo*, 360 U. S. 564, 585.

[17] *Developments in the Law—Defamation*, 69 Harvard L. Rev. 877, 927 (1956).

[18] *United Gas Public Service Company v. Texas*, 303 U. S. 123, 153, Black J. concurring.

out its entire history, this Court has never held that private damage suits for common law libel in state courts involved constitutional questions.[19] Respondent vigorously disputes the Times' assertion that this Court is wrong in its history (Brief, pp. 44-48), and that the constitutional pronouncements in those cases are mere "adjectives" and statements "made in passing" (Brief, p. 40). Respondent is confident that this Court meant what it said in **Roth v. U. S.**, 354 U. S. 476, 483, for example:

> "In light of this history it is apparent that the unconditional phrasing of the First Amendment was not intended to protect every utterance. This phrasing did not prevent this Court from concluding that libelous utterances are not within the area of constitutionally protected speech (citation)."

Again in **Konigsberg** this Court pronounced that it "has consistently recognized [that] . . . . certain forms of speech [have] been considered outside the scope of constitutional protection." 366 U. S. 36, 50, citing **Beauharnais** and **Roth**.

Moreover, commercial advertisements are not constitutionally protected as speech and press, since there is no real restraint on speech and press where commercial activity is involved. **Valentine v. Chrestensen**, 316 U. S. 52, 54; **Breard v. City of Alexandria**, 341 U. S. 622, 643.[20] The Times has termed the citation of these cases "frivolous" and "cynical" (Brief, pp. 31 and 57). But its analysis of

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[19] *Beauharnais v. Illinois*, 343 U. S. 250; *Near v. Minnesota*, 283 U. S. 697, 715; *Konigsberg v. State Bar of California*, 366 U. S. 36, 49-50; *Roth v. U. S.*, 354 U. S. 476, 483; *Chaplinsky v. New Hampshire*, 315 U. S. 568, 571-572.

[20] Lower Federal court decisions accord. *Pollak v. Public Utilities Commission*, 191 F. 2d 450, 457 (D. C. Cir. 1951); *E. F. Drew & Co. v. Federal Trade Commission*, 235 F. 2d 735, 740 (2d Cir. 1956), cert. den. 352 U. S. 969.

Valentine v. Chrestensen is incomplete—the other side of the handbill protested a city department's refusal of wharfage facilities. And the Times itself classified the ad as a commercial one, and submitted it to the Advertising Acceptability Department and to the standards of censorship which that department is supposed to impose. The Times charged the regular commercial advertising rate of almost five thousand dollars, scarcely as "an important method of promoting some equality of practical enjoyment of the benefits the First Amendment was intended to secure". (Brief, p. 58).

This Court last term in **Abernathy v. Patterson**, 368 U. S. 986, declined to review a decision of the Court of Appeals, 295 F. 2d 452, 456-457, which had held this very publication unprotected constitutionally as a libelous utterance. The Court of Appeals stated that the only constitutional claim could be one relating to the conduct of the trial.

In 1804, Thomas Jefferson wrote to Abigail Adams, referring to his condemnation of the Sedition Act of 1798:

> "Nor does the opinion of the unconstitutionality and consequent nullity of that law remove all restraint from the overwhelming torrent of slander which is confounding all vice and virtue, all truth and falsehood in the U. S. The power to do that is fully possessed by the several state legislatures. It was reserved to them, and was denied to the general government, by the constitution according to our construction of it. While we deny that Congress have a right to control the freedom of the press, we have ever asserted the right of the states, and their exclusive right, to do so."[21]

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[21] Quoted in *Dennis v. U. S.*, 341 U. S. 494, 522, n. 4, and in *Beauharnais v. Illinois*, 343 U. S. 250, 254, n. 4.

Again in his second inaugural address on March 4, 1805, Jefferson said:

> "No inference is here intended that the laws provided by the States against false and defamatory publications should not be enforced; he who has time renders a service to public morals and public tranquility in reforming these abuses by the salutary coercions of the law; but the experiment is noted to prove that, since truth and reason have maintained their ground against false opinions in league with false facts, the press, confined to truth, needs no other legal restraint; the public judgment will correct false reasonings and opinions on a full hearing of all parties; and no other definite line can be drawn between the inestimable liberty of the press and its demoralizing licentiousness."[22]

A century and a quarter later, Justices Holmes and Brandeis joined Chief Justice Hughes, who spoke for the Court in **Near v. Minnesota**, 283 U. S. 697, 715:

> "But it is recognized that punishment for the abuse of the liberty accorded to the press is essential to the protection of the public, and that the common law rules that subject the libeler to responsibility for the public offense, as well as for the private injury, are not abolished by the protection extended in our constitutions."

Twenty years thereafter, this Court upheld an Illinois criminal group libel statute which had been applied to one who had distributed a pamphlet charging that Negroes as a class were rapists, robbers, carriers of knives and guns, and users of marijuana. **Beauharnais v. Illinois**, 343 U. S. 250, 266:

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[22] I *Messages and Papers of the Presidents*, Joint Committee on Printing, 52nd Congress, pp. 366, 369 (1897).

"Libelous utterances, not being within the area of constitutionally protected speech, it is unnecessary, either for us or for the State courts, to consider the issues behind the phrase 'clear and present danger.'"

Since *Beauharnais*, as the table contained in Appendix A of respondent's brief in opposition shows, this Court has declined to review forty-four libel cases coming from the state and federal courts. It has reviewed three. Two of them[23] resulted in a holding that certain lower echelon federal executive personnel had an absolute privilege. The third[24] held that a radio and television station, which gave equal time to all political candidates because of the dictates of § 315 of the Federal Communications Act, was absolutely immune, by virtue of the same act, from state libel suits growing out of any such broadcasts.

The Times and its powerful corporate newspaper friends obviously realize that history and precedent support the holding below that this libelous advertisement is not constitutionally protected. They assert, therefore, at least for themselves and others who conduct the business of mass communication, an absolute privilege to defame all public officials—even in paid advertisements; even when the defamation renders the classic defenses of truth, fair comment and privilege unavailable; even when there is no retraction to show good faith. They urge this Court to write such a fancied immunity into the constitution—at least for themselves, for they are silent on whether this new constitutional protection is to extend to ordinary speakers and writers. The obvious consequence of such a holding would be the confiscation of the rights of those defamed to assert their traditional causes of action for defamation in state courts.

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[23] *Barr v. Matteo*, 360 U. S. 564; and *Howard v. Lyons*, 360 U. S. 593.

[24] *Farmers Union v. WDAY, Inc.*, 360 U. S. 525.

The Times attempts to cloak this defamatory advertisement with constitutional respectability. The ad is called "the daily dialogue of politics" and mere "political criticism" and "political expression." Surely desperation leads the Times so to characterize a charge that respondent, as police commissioner, was responsible for the criminal and rampant "unprecedented wave of terror" which this ad sought to portray falsely.

If the Times prevails, then any statement about any public official becomes "the daily dialogue of politics," "political expression and criticism" and "a critique of attitude and method, a value judgment and opinion." The absolute immunity would cover false statements that the Secretary of State had given military secrets to the enemy; that the Secretary of the Treasury had embezzled public funds; that the Governor of a state poisoned his wife; that the head of the public health service polluted water with germs; that the mayor and city council are corrupt; that named judges confer favorable opinions on the highest bidder; and that a police commissioner conducted activities so barbaric as to constitute a wave of terror. If a state court indulges in "mere labels" without constitutional significance when it holds such utterances libelous, and if such defamatory statements about "public men" are to be protected as legitimate and socially useful speech, then the Times and its friends urge this Court to "convert the constitutional Bill of Rights into a suicide pact."[25]

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[25] Jackson, J. dissenting in *Terminiello v. Chicago*, 337 U. S. 1, 37.

The Times wrongly argues that Mr. Justice Frankfurter's caveat in *Beauharnais* was designed for such a purpose (Brief, p. 41). He examined the hypothetical dangers of permitting statutes which outlawed libels of political parties. Justice Frankfurter observed that such attempts would "raise quite different problems not now before us" (343 U. S. 250, 264), and it was in this context that he observed that the doctrine of fair comment would come into play "since political parties, like public men, are, as it were, public property." The case at bar, too, presents far different problems.

Clearly, Congress and this Court did not find such a constitutional immunity, hence Section 315 and **Farmers Union v. WDAY**, 360 U. S. 525. The very reason for such Congressionally conferred immunity was the "widely recognized" existence of causes of action for libel by defamed candidates for public office "throughout the states" (360 U. S. 525 at 535). This Court found that Congress had given immunity because broadcasters would have too much difficulty determining whether a particular equal time broadcast was defamatory in terms of relevant state law. 360 U. S. 525 at 530. Surely this Court did not decide **WDAY** on an assumption that the Constitution already provided such immunity absent a "clear and present danger."

Beauharnais, 343 U. S. 250 at 266, disposes of petitioner's "clear and present danger" cases (pp. 13-15) involving criminal prosecutions for breach of peace, criminal syndicalism and contempt of court.[28] Indeed, the background of one of them, **Pennekamp v. Florida**, 328 U. S. 331, 348-349, sharply distinguishes these cases from the one at bar. This Court told Pennekamp that even those hardy judges described by petitioner could bring private suits for defamation in state courts. "For such injuries,

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[28] *Cantwell v. Connecticut*, 310 U. S. 296; *DeJonge v. Oregon*, 299 U. S. 353; *Bridges v. California*, 314 U. S. 252; *Pennekamp v. Florida*, 328 U. S. 331; *Craig v. Harney*, 331 U. S. 367; *Wood v. Georgia*, 370 U. S. 375; *Edwards v. South Carolina*, 372 U. S. 229; *Terminiello v. Chicago*, 337 U. S. 1; *Whitney v. California*, 274 U. S. 357; *Stromberg v. California*, 283 U. S. 359. While *Cantwell* is cited by the Times for the proposition that political expression is not limited by any test of truth, it omits the more relevant observation just following:

> "There are limits to the exercise of these liberties. The danger in these times from the coercive activities of those who in the delusion of racial or religious conceit would incite violence and breaches of the peace in order to deprive others of their equal right to the exercise of their liberties, is emphasized by events familiar to all. These and other transgressions of those limits the states appropriately may punish" (at p. 310).

when the statements amount to defamation, a judge has such remedy in damages for libel as do other public servants."[27]

Pennekamp—editor of the Miami Herald—ignored this warning. Perhaps he assumed, as does the Times, that the official's remedy was "left at large," and that there was an absolute privilege to level not only fair but false and defamatory criticism at public officials. Pennekamp discovered that he was wrong, and that the remedy had been brought in tow, when his paper libeled a prosecuting attorney who recovered $100,000 in damages. **Miami Herald v. Brautigam** (Fla.), 127 So. 2d 718. Even though Pennekamp and his paper were able to plead fair comment and truth, and claimed the editorial expression as their own,[28] this Court declined to review despite the same First and Fourteenth Amendment arguments which the Times advances in its brief. 369 U. S. 821.

Two of this Court's greatest figures rejected a contention that newspapers should have an absolute privilege to defame public officials and a consequent absolute immunity from private libel suits. Mr. Justice, then Judge Holmes, in **Burt v. Advertiser Company**, 154 Mass. 238, 28 N. E. 1, 4, upholding a trial court charge to the jury that newspaper statements of fact, as distinguished from opinion, if false, were not privileged, said:

> "But what the interest of private citizens in public matters requires is freedom of discussion rather than

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[27] Surely the Times does not assert seriously that this Court "left at large" what may amount to defamation and what remedy a public servant has (Brief, p. 41). He has the same remedy under the laws of his state that any other citizen has.

[28] In the Supreme Court of Alabama, the Times literally disavowed the advertisement as its utterance: "The ad was not written by anyone connected with The Times; it was not printed as a report of facts by The Times, nor as an editorial or other expression of the views of The Times" (Reply Brief, p. 12).

of statement. Moreover, the statements about such matters which come before the courts are generally public statements, where the harm done by a falsehood is much greater than in the other case.

"If one private citizen wrote to another that a high official had taken a bribe, no one would think good faith a sufficient answer to an action. He stands no better, certainly, when he publishes his writing to the world through a newspaper, and the newspaper itself stands no better than the writer."

Mr. Chief Justice, then Judge Taft, upholding a similar trial court charge in **Post Publishing Company v. Hallam**, 59 F. 530, 540 (6th Cir., 1893), wrote:

"[I]f the [absolute] privilege is to extend to cases like that at bar, then a man who offers himself as a candidate must submit uncomplainingly to the loss of his reputation, not with a single person or a small class of persons, but with every member of the public, whenever an untrue charge of disgraceful conduct is made against him, if only his accuser honestly believes the charge upon reasonable ground. We think that not only is such a sacrifice not required of everyone who consents to become a candidate for office, but that to sanction such a doctrine would do the public more harm than good."

Judge Taft rejected the argument, urged here by the Times and its newspaper friends, that the privilege of fair comment "extends to statement of fact as well as comment" when made by one "who has reasonable grounds for believing, and does believe, that [the public officer or candidate] has committed disgraceful acts affecting his fitness for the office he seeks" (59 F. 530 at 540).

Judge Taft's admonitions still obtain, as Chief Justice Warren observed, in the majority of the states which

hold that a public critic of government "is not even qualifiedly privileged where his facts are wrong." Barr v. Matteo, 360 U. S. 564, 585. Alabama is in accord with the great weight of state and federal authority.[29]

A noted commentator, Professor Zechariah Chafee, an old and close friend of free speech and press, also disagrees with the Times' law and history:

> "Especially significant is the contemporaneous evidence that the phrase 'freedom of the press' was viewed against a background of familiar legal limitations which men of 1791 did not regard as objectionable, such as damage suits for libel. Many state constitutions of this time included guaranties of freedom of speech and press which have been treated as having approximately the same scope as the federal provisions. Some of these, as in Massachusetts, were absolute in terms, while others, as in New York, expressly imposed responsibility for the abuse of the right. The precise nature of the state constitutional language did not matter; the early interpretation was much the same. Not only were private libel suits allowed, but also punishments for criminal libel and for contempt of court. For instance, there were several Massachusetts convictions around 1800 for libels attacking the conduct of the legislature and of public officials. This evidence negatives the author's idea of a firmly established purpose to make all political discussion immune."[30]

The Times can cite no authority holding that the Federal Constitution grants it an absolute privilege to defame a public official.

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[29] See *Washington Times Company v. Bonner*, 86 F. 2d 836, 842 (D. C. Cir. 1936).

[30] Chafee, Book Review, 62 Harvard L. Rev. 891, 897-898 (1949) (Footnotes omitted).

The Advertisement Was Libelous Per Se.

The Times and its friends complain that the court below has held libelous *per se* a publication which is false, which tends to injure the person defamed in his reputation, which brings him into public contempt as an official, and which charges him with crime. Such a standard, they argue, is a common law concept of the most general and undefined nature. But this Court in **Beauharnais v. Illinois**, 343 U. S. 250, 257, n. 5, approved Judge Learned Hand's definition of libel in **Grant v. Reader's Digest**, 151 F. 2d 733, 735 (2d Cir. 1945), "in accordance with the usual rubric, as consisting of utterances which arose 'hatred, contempt, scorn, obloquy or shame,' and the like." Such a definition, this Court held, was a familiar —not a general and undefined—common law pronouncement.

The Times objects because the court decided the question of whether the publication was libelous *per se*. But the Times' contention opposes **Baker v. Warner**, 231 U. S. 588, 594. And see **Beauharnais**, 343 U. S. 250, 254:

> "Similarly, the action of the trial court in deciding as a matter of law the libelous character of the utterance, leaving to the jury only the question of publication, follows the settled rule in prosecutions for libel in Illinois and other States."

The Times complains because Alabama presumes general damages from a publication libelous *per se*, including the uncertain future damage of loss of job. This is the law generally.[31]

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[31] Commentators precisely oppose the Times' view. See Note, *Exemplary Damages in the Law of Torts*, 70 Harvard L. Rev. 517, 531 (1957), where it was observed that a requirement of correlation between actual and punitive damages "fails to carry out the punitive function of exemplary damages, since it stresses the harm

This publication charged a public official in devastating fashion with departing from all civilized standards of law and decency in the administration of his official duties. The correctness of the determination below that it is libelous *per se* is underscored by **Sweeney v. Schenectady Union Publishing Company**, 122 F. 2d 288, affirmed 316 U. S. 642. There a statement that a Congressman opposed a federal judicial appointment because of anti-Semitism was held libelous *per se* as a matter of law.

Very recently this same Court in **Hogan v. New York Times**, 313 F. 2d 354, 355 (2d Cir. 1963), observed that the Times did not even contest on appeal a district court holding that its news article describing a dice game raid of two policemen as a Keystone cop performance was "libelous per se as a matter of law."

Clearly the court below has correctly applied the Alabama common law of libel—law which accords in all relevant particulars with that of many other states.

Damages Awarded by the Jury May Not Be Disturbed.

The Times' objection that punitive damages in libel should not be imposed to deter the libeler and others like him from similar misconduct does not square with **Beauharnais**, 343 U. S. 250, 263. The Alabama test is precisely that of **Reynolds v. Pegler**, 123 F. Supp. 36, 38, affirmed 223 F. 2d 429 (2d Cir.), cert. den. 350 U. S. 846.[22]

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which actually results rather than the social undesirability of the defendant's behavior."

See, *Developments in the Law—Defamation*, 69 Harvard L. Rev. 875, at 934, et seq. And see ibid. at 937: "Because defamation is a tort likely to cause substantial harm of a type difficult to prove specifically, courts will allow a substantial recovery of general damages on a presumption of harm even though the plaintiff offers no proof of harm." See also 3 *Restatement of Torts*, § 621, pp. 313-316.

[22] "Punitive or exemplary damages are intended to act as a deterrent upon the libelor so that he will not repeat the offense, and to

There the jury brought back one dollar compensatory damages and $175,000 in punitive damages.

In its argument that the size of this verdict impinges its constitutional rights, the Times has ignored a recent New York decision refusing to disturb a verdict of $3,500,000, of which the sum of $2,500,000 was punitive damages, against a publication and another for stating that plaintiff was linked to a Communist conspiracy. **Faulk v. Aware, Inc.**, 231 N. Y. S. 2d 270, 281:

> "In libel suits, of course, punitive damages have always been permitted in the discretion of the jury. The assessment of a penalty involves not only consideration of the nature and degree of the offense but the higher moral consideration that it may serve as a deterrent to anti-social practices where the public welfare is involved. The jury, representing the community, assesses such a penalty as, in its view, is adequate to stop the practices of defendants and others having similar designs."

The New York Times did not condemn the **Faulk** verdict—seven times as great as the one at bar—as heralding the demise of a free press. Instead, the Times applauded the verdict as "having a healthy effect."[23]

Quite recently a Federal jury returned a libel verdict of $3,060,000 in favor of a former college athletic director

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serve as a warning to others. They are intended as punishment for gross misbehavior *for the good of the public* and have been referred to as a 'sort of hybrid between a display of ethical indignation and the imposition of a criminal fine.' *Punitive damages are allowed on the ground of public policy and not because the plaintiff has suffered any monetary damages for which he is entitled to reimbursement; the award goes to him simply because it is assessed in his particular suit.* The damages may be considered expressive of the community attitude towards one who wilfully and wantonly causes hurt or injury to another" (Emphasis supplied; footnotes omitted).

[23] Editorial of June 30, 1962, p. 18.

"A free press is vital to a democratic society because its freedom gives it power. Power in a democracy implies responsibility in its exercise. No institution in a democracy, either governmental or private, can have absolute power. Nor can the limits of power which enforce responsibility be finally determined by the limited power itself. (Citation.) In plain English, freedom carries with it responsibility even for the press; freedom of the press is not a freedom from responsibility for its exercise. Most State constitutions expressly provide for liability for abuse of the press's freedom. That there was such legal liability was so taken for granted by the framers of the First Amendment that it was not spelled out. Responsibility for its abuse was imbedded in the law. The First Amendment safeguarded the right."[52]

These freedoms are amply protected when a newspaper in a state court can plead and prove truth; can plead and prove fair comment; and can plead and prove privilege. Even when it cannot, it can retract, show its good faith, and eliminate punitive damages. Alabama thus provides the very safeguards which, the Times and its friends argue, are essential to protect petitioner's constitutional rights.

When it can do none of these, and when it has indeed defamed in a commercial advertisement, no constitutional right, privilege or immunity expounded by this Court during its entire history shields a newspaper from damages in a common law libel suit.

The Times and its cohorts would have this Court abandon basic constitutional standards which have heretofore obtained and which Justice Harlan recently described:

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[52] Frankfurter J., concurring in *Pennekamp v. Florida*, 328 U. S. 331, 355-356 (Footnotes omitted).

"No member of this Court would disagree that the validity of state action claimed to infringe rights assured by the Fourteenth Amendment is to be judged by the same basic constitutional standards whether or not racial problems are involved."[53]

IV.

The Times Was Properly Before the Alabama Courts.

1. Because both courts below held that the Times had made a general appearance,[54] an adequate independent state ground as to jurisdiction over the Times in this suit is a bar to review here. **Herb v. Pitcairn**, 324 U. S. 117, 125-126; **Murdock v. Memphis**, 20 Wall. 590, 626; **Fox Film Corporation v. Muller**, 296 U. S. 207, 210; **Minnesota v. National Tea Company**, 309 U. S. 551, 556-557.

The Times intended to assert, and did, that the trial court was without jurisdiction of the subject matter of this action. Indeed, the Times still argues in this Court that there was no jurisdiction of the subject matter (Brief, p. 63). This act, alone, is a general appearance in Alabama and in a majority of state courts. In addition, the Times compounded its general appearance by other activities in the Alabama courts unrelated to the claimed lack of personal jurisdiction.

Petitioner argues that the Alabama Supreme Court has incorrectly interpreted its own decisions, and that the de-

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[53] *NAACP v. Button*, 371 U. S. 415, 9 L. Ed. 2d 405, 427 (dissenting opinion of Harlan, Clark and Stewart, J. J.).

[54] A state court's interpretation of its own case law is binding here. *Fox River Paper Company v. Railroad Commission*, 274 U. S. 651, 655; *Guaranty Trust Company v. Blodgett*, 287 U. S. 509, 513; *United Gas Pipeline Company v. Ideal Cement Company*, 369 U. S. 134.

Texas, for example, long provided that any appearance at all was a general appearance. *York v. Texas*, 137 U. S. 15, 20.

who was charged with rigging a football game. The specified punitive damages were $3,000,000, even higher than those in the **Faulk** case.[24]

Another commentator has observed that in England "the survival of honorific values and standards of communal decency keep defamation at a minimum and subject it, when it raises its head, to staggering jury verdicts." Riesman, **Democracy and Defamation**, 42 Columbia L. Rev. 727, 730.

It is appropriate here to remind this Court that it has always considered itself barred by the Seventh Amendment from setting aside state and federal jury damage awards as inadequate or excessive. **Chicago, B. & Q. v. Chicago**, 166 U. S. 226, 242-243 ($1 verdict in condemnation proceeding); **Fairmount Glass Works v. Cub Fork Coal Co.**, 287 U. S. 474 (and cases cited); **St. Louis, etc., Ry. Co. v. Craft**, 237 U. S. 648; **Maxwell v. Dow**, 176 U. S. 581, 598; **Southern Ry. v. Bennett**, 233 U. S. 80, 87; **Hercencia v. Guzman**, 219 U. S. 44, 45; **Eastman Kodak v. Southern Photo Materials**, 273 U. S. 359; **L. & N. v. Holloway**, 246 U. S. 525; cf. **Neese v. Southern Ry.**, 350 U. S. 77. See also, **Justices v. U. S. ex rel. Murray**, 9 Wall. 274, said by this Court to be one of many cases showing "the uniform course of decision by this Court for over a hundred years in recognizing the legal autonomy of state and federal governments." **Knapp v. Schweitzer**, 357 U. S. 371, 378-379.

In an attempt to avoid this precedent, the Times first cites a series of cases which hold statutory penalties subject to judicial review as excessive—cases obviously having nothing to do with appellate review of jury verdicts.[25]

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[24] *New York Times*, August 21, 1963, p. 1.

[25] *Life & Casualty Co. v. McCray*, 291 U. S. 566; *Chicago and N. W. Ry. v. Nye Schneider Fowler Company*, 260 U. S. 35; *Mo. Pac. Ry. Co. v. Tucker*, 230 U. S. 340; *St. Louis, etc. Ry. v. Wi-*

Next the Times urges that respondent's cases permit appellate review of excessive jury damage awards as errors of law (Brief, p. 69). But the cases themselves are otherwise. They cite, as examples of errors of law, awards which exceed the statutory limits; or are less than the undisputed amount; or are pursuant to erroneous instructions on measure of damages; or are in clear contravention of instructions of the court. **Fairmount Glass Works v. Cub Fork Coal Company**, 287 U. S. 474, 483-484. Another case, **Chicago, B. & Q. RR. v. Chicago**, 166 U. S. 226, 246, holds instead:

> "We are permitted only to inquire whether the trial court prescribed any rule of law for the guidance of the jury that was in absolute disregard of the company's right to just compensation."

Another case, **Dimick v. Schiedt**, 293 U. S. 474, did not hold that the question of excessive or inadequate verdicts was one of law, but on the contrary that it was "a question of fact." 293 U. S. 474 at 486. And **A. & G. Stevedores v. Ellerman Lines**, 369 U. S. 355, 360, cited by the Times, stated that the Seventh Amendment "fashions 'the federal policy favoring jury decisions of disputed fact questions'."

The Times then argues that this Court may review the amount of damages because alleged abridgment of freedom of the press must take precedence over the Seventh Amendment (Brief, p. 69). It cites no authority for this amazing argument—one which scarcely accords with this Court's observation in **Jacob v. City of New York**, 315 U. S. 752 and 753:

> "The right of jury trial in civil cases at common law is a basic and fundamental feature of our system

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liams, 251 U. S. 63. The other case cited for this purpose is a criminal case dealing with the Sixth Amendment. *Robinson v. California*, 370 U. S. 660 (Brief, p. 68).

of federal jurisprudence which is protected by the Seventh Amendment. A right so fundamental and sacred to the citizen, whether guaranteed by the Constitution or provided by statute, should be jealously guarded by the courts."

The Times quickly moves on to an argument almost as tenuous, namely, that modern authority "regards the Seventh Amendment as inapplicable generally to appellate review of an excessive verdict . . ." (Brief, p. 69). The premise clashes with **Neese v. Southern Ry.**, 350 U. S. 77, as well as with such cases as **Fairmount**, *supra*, 287 U. S. 474, 481:

> "The rule that this Court will not review the action of a federal trial court in granting or denying a motion for a new trial for error of fact has been settled by a long and unbroken line of decisions; and has been frequently applied where the ground of the motion was that the damages awarded by the jury were excessive or were inadequate." (Footnotes omitted.)

Finally, the Times complains that there was constitutional infirmity in the failure of the Alabama court to permit special interrogatories to the jury on damages, and thereby to deprive the jury of its right to return a general verdict.[28] Surely there is no constitutional defect in Alabama's adherence to the common law general verdict so recently eulogized by Justices Black and Douglas when they condemned an extension of the practice of submitting special interrogatories to federal juries:

> "Such devices are used to impair or wholly take away the power of a jury to render a general verdict

[28] *Johnson Pub. Co. v. Davis*, 271 Ala. 474, 496, 124 So. 2d 441; *All States Life Ins. Co. v. Jandon*, 230 Ala. 593, 162 So. 668; *Little v. Sugg*, 243 Ala. 196, 8 So. 2d 866; *Spry v. Pruitt*, 256 Ala. 341, 54 So. 2d 701.

> One of the ancient, fundamental reasons for having general jury verdicts was to preserve the right of trial by jury as an indispensable part of a free government. Many of the most famous constitutional controversies in England revolved around litigants' insistence, particularly in seditious libel cases, that a jury had the right to render a general verdict without being compelled to return a number of subsidiary findings to support its general verdict. Some English jurors had to go to jail because they insisted upon their right to render general verdicts over the repeated commands of tyrannical judges not to do so."[37]

Accordingly, a review of the damages awarded by the jury in this case is beyond the powers of this Court. Moreover, the verdict, as the court below held, conforms to the general damages suffered by the respondent and to the wrong which the Times committed. The Times does not claim here that the jury was motivated by passion or prejudice or corruption or any improper motive. Two state courts have found that it was not.

The jury was no doubt struck by the amazing lack of concern and contrition exhibited by the Times' representatives at the trial, and it certainly contrasted their conduct. The Times' attorneys did not plead truth; did not attempt to introduce evidence of truth; suggested in cross-examination of respondent's witnesses that the matter was untrue and would not be believed; stated in open court that truth was not in issue; and could not plead fair comment or privilege. The Times retracted the same matter as erroneous and misleading for another person whom it considered to be "on a par" with respondent. But the secretary of the corporation, who had signed its answers to

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[37] Statement of Mr. Justice Black and Mr. Justice Douglas on the Rules of Civil Procedure and the Proposed Amendments, 31 F. R. D. 617, at 618-619.

interrogatories, said that with the exception of the pad-locking incident he believed the matters in the ad were not substantially incorrect.

Even more recently the conduct of the Times' business has warranted judicial condemnation. Hogan v. New York Times, 313 F. 2d 354, 355-356 (2d Cir. 1963):

> "We believe that sufficient evidence existed to sustain the jury verdict on either of the two possible grounds upon which its decision that defendant abused its qualified privilege might have been based: (1) improper purpose in publishing the article, or (2) reckless disregard for the truth or falsity of the story, amounting to bad faith."

The Times had its chance to retract and eliminate punitive damages, but chose not to do so for this respondent though it retracted for another person "on a par." A restriction of respondent to special damages would compound the evils described by Mr. Chafee in the following statement which he quoted with approval:

> " 'To require proof of special damages would mean virtual abolition of legal responsibility for inadvertent newspaper libel. Newspaper slips are usually the result of reprehensible conduct of members of the defendant's organization. To deny plaintiffs recovery for retracted libel unless they prove special damages, is to do away with newspapers' financial interest in accuracy. The tendency towards flamboyance and haste in modern journalism should be checked rather than countenanced. If newspapers could atone legally for their mistakes merely by publishing corrections, the number of mistakes might increase alarmingly. . . . "[38]

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[38] Quoted in Chafee, *Possible New Remedies for Errors in the Press*, 60 Harvard L. Rev., 1, 23.

II.

There Is No Ground for Reviewing a Jury Determination That the Advertisement Was "of and Concerning" the Plaintiff.

The Times' assertion that this Court should decide as a matter of constitutional law that the jury which tried this case was wrong in finding that the advertisement was "of and concerning" respondent is astounding. Respondent will not repeat here the thorough discussion of the testimony analyzing the false allegations of the ad and their reference to respondent as police commissioner of Montgomery. Apparently a reading of this testimony has now impressed even the Times. It has omitted from its brief on the merits the cases of **Thompson v. Louisville**, 362 U. S. 199, and **Garner v. Louisiana**, 368 U. S. 157, cited in its petition for certiorari for the proposition that there was no evidence to support the verdict.

Again the Times seeks to overturn imbedded constitutional principles. This case has been tried in a state court according to admittedly proper court procedure, and a jury has decided the facts. This Court simply does not go behind these factual determinations and review a state court judgment, entered on a jury verdict and affirmed by the highest state appellate court. **Chicago, B. & Q. R. Co. v. Chicago**, 166 U. S. 226 at 242-243; **United Gas Public Service Co. v. Texas**, 303 U. S. 123, 152-153 (Black, J., concurring); **Fairmount Glass Works v. Cub Fork Coal Co.**, 287 U. S. 474; **Maxwell v. Dow**, 176 U. S. 581, 598.[39]

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[39] The Times seeks to circumvent these cases—and the 7th Amendment—by citing inapposite cases dealing with review here of state court conclusions as to a federal right where facts inadequately support the conclusion. *Norris v. Alabama*, 294 U. S. 587; *Wood v. Georgia*, 370 U. S. 375; *Craig v. Harney*, 331 U. S. 367; *Pennekamp v. Florida*, 328 U. S. 331; *Bridges v. California*, 314 U. S. 252; *Edwards v. South Carolina*, 372 U. S. 229—cases involving state court (not jury) determinations of questions of dis-

When this Court in **Gallick v. B. & O. R. Co.**, 372 U. S. 108, 9 L. Ed. 2d 618, 627, held that its duty was to reconcile state jury findings "by exegesis if necessary," it surely assigned no lesser place to the Seventh Amendment than that described by Justices Black and Douglas:

> "The call for the true application of the Seventh Amendment is not to words, but to the spirit of honest desire to see that constitutional right preserved. Either the judge or the jury must decide facts and to the extent that we take this responsibility, we lessen the jury function. Our duty to preserve this one of the Bill of Rights may be peculiarly difficult, for here it is our own power which we must restrain."[40]

Similar principles permeated the judicial philosophy of Judge Learned Hand:

> "And so only the most unusual circumstances could justify judicial veto of a legislative act . . . . or a jury verdict. Hand's standard for intervention was essentially the same in both cases. It came simply to this: if there was room for doubt, legislation—like a verdict—must stand, however, mistaken it might seem to judges. Ambivalence in the law was the province of jury and legislature—the two authentic voices of the people. Judicial intervention was permissible only when a court was prepared to hold that no rea-

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crimination in the selection of a grand jury, and of the existence of a clear and present danger; *Watts v. Indiana*, 338 U. S. 49—a state court determination as to a coerced confession; *Herndon v. Lowry*, 301 U. S. 242—a case invalidating a conviction because the criminal statute prescribed "no reasonably ascertainable standard of guilt" (at 264); and *Fiske v. Kansas*, 274 U. S. 380—overturning a conviction under a criminal syndicalism act where the prosecution had introduced no evidence other than a preamble of the constitution of the Industrial Workers of the World which this Court found to be no evidence to support the conviction.

[40] *Galloway v. United States*, 319 U. S. 372, 407 (Black, Douglas and Murphy, JJ., dissenting).

sonable mind could have found as the legislature or jury did find."[41]

Regarding falsity, the statements in the ad have been discussed exhaustively in this brief. The Times was unable to plead truth; and conceded falsity before the trial by its retraction to Governor Patterson and at the trial through the statements of its attorneys. It is surely paradoxical for the Times to assert in this Court that the record is so "devoid" of evidence of falsity as to invoke the certiorari jurisdiction of this Court. Nothing could be more idle than to debate with the Times and its friends the question of whether Alabama imposes the burden of proving truth on the wrong party, when the Times by its judicial admissions has conceded falsity.[42]

Moreover, this record reveals this ad's devastating effect on respondent's reputation among those who believed it. Courts have easily and effectively dealt with the Times' argument that the publication was not libelous or injurious because it was not believed in the community (Brief, p. 65).[43] Perhaps the Times would also argue that those in a

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[41] Mendelson, *Learned Hand: Patient Democrat*, 76 Harvard L. Rev. 322, 323-324 (1962).

[42] Completely inapposite, therefore, are the Times' citations of *Speiser v. Randall*, 357 U. S. 513 and *Bantam Books, Inc. v. Sullivan*, 372 U. S. 58, regarding inadequate state procedures where the speech or writing itself may be limited.

[43] See e. g. *Reynolds v. Pegler*, 123 F. Supp. 36, 37-38, affirmed 223 F. 2d 429 (2d Cir.), cert. denied 350 U. S. 846:

> "'A person may be of such high character that the grossest libel would damage him none; but that would be no reason for withdrawing his case from the wholesome, if not necessary, rule in respect of punitive damages. . .'
>
> To adopt the contrary view . . . would mean that a defamer gains a measure of immunity no matter how venomous or malicious his attack simply because of the excellent reputation of the defamed; it would mean that the defamer, motivated by actual malice, becomes the beneficiary of that unassailable reputation and so escapes punishment. It would require punitive damages to be determined in inverse ratio to the reputation of the one defamed."

crowded theater who did not see or smell smoke would not believe a person who yelled "fire".

It is patently frivolous for the Times to argue that no ordinary person of reasonable intelligence[44] could possibly read this advertisement as referring to the Montgomery police commissioner. Nor is a jury bound by the Federal Constitution to take the Times' construction of these words after its attorneys have completed a sanitizing operation in an attempt to dull the cutting edges of these words.[45]

Beauharnais v. Illinois, 343 U. S. 250, teaches that a libel plaintiff need not be named in the defamatory publication. There the criminal prosecution was for defamation of the entire Negro race.[46]

It is difficult to believe that the Times is serious when it argues that this record is entirely devoid of evidence to support the jury finding that these defamatory words were of and concerning respondent.

The ad sought to, and did, portray criminal and rampant police state activity resulting from the singing of "My Country, 'Tis of Thee" from the State Capitol steps. It sought to portray, and did, a resultant "wave of terror" against innocent persons—expulsion from school; ringing

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[44] This is the test everywhere. See *Albert Miller & Co. v. Corte*, 107 F. 2d 432, 435 (5th Cir. 1939), which holds that Alabama cases to this effect accord with libel law generally. See also *Peck v. Tribune Co.*, 214 U. S. 185 (where the wrong person was named); *Grant v. Reader's Digest*, 151 F. 2d 733 (2d Cir. 1945); *Spanel v. Pegler*, 160 F. 2d 619 (7th Cir. 1949); 3 *Restatement of Torts*, § 580, Comments (b) and (c), pp. 205-207.

[45] Authorities in Footnote 44.

[46] See also *Cosgrove Studio, Inc. v. Pane*, 408 Pa. 314, 182 A. 2d 751, 753:

> "The fact that the plaintiff is not specifically named in the advertisement is not controlling. A party defamed need not be specifically named, if pointed to by description or circumstances tending to identify him. . . ."

of the campus of Alabama State College with truckloads of police armed with shotguns and tear gas; and padlocking of the dining hall to starve protesting students into submission. And the ad returned to Montgomery in the second quoted paragraph to charge that pursuant to the same "wave of terror", those who had arrested King for loitering and speeding also had bombed his home, assaulted his person, and indicted him for perjury.[47]

The effect of this publication was as deadly as intended —to instill in the minds of the readers the conclusion that these acts had been perpetrated by Montgomery city officials, specifically the police commissioner. The Times can suggest no one else except the police, whose massive acts in the public mind are surely the work of the commissioner. The connotation is irresistible—certainly not, as the Times argues, completely devoid of rationality.

Moreover, the jury heard witnesses who made the association. **Hope v. Hearst Consolidated Publications**, 294 F. 2d 681 (2d Cir.), cert. denied 368 U. S. 956; **Chagnon v. Union Leader Corp.**, 103 N. H. 426, 174 A. 2d 825, 831-832, cert. denied 369 U. S. 830.

Respondent sued as a member of a group comprising three city commissioners. Libel suits by members of private or public groups of this size are widely permitted. The decision below accords with the law generally.[48]

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[47] Even Gershon Aaronson of the Times so read "they" as used in this paragraph of the advertisement (R. 745).

[48] *Hope v. Hearst Consolidated Publications*, 294 F. 2d 681 (2d Cir.), cert. denied 368 U. S. 956 (One of Palm Beach's richest men caught his blonde wife in a compromising spot with a former FBI agent); *Nieman-Marcus v. Lait*, 13 F. R. D. 311 (S. D. N. Y. 1952) (immoral acts tributed to department store's 9 models and 25 salesmen); *National Cancer Hospital v. Confidential, Inc.*, 136 N. Y. S. 2d 921 (libelous article about "hospital" gave cause of action to those who conducted hospital); *Weston v. Commercial Advertisers*, 184 N. Y. 479, 77 N. E. 660 (4 coroners); *Bornmann*

III.

This Case Provides No Occasion for Excursions From This Record and From Accepted Constitutional Standards.

In a desperate effort to secure review in this Court, the Times and its friends go outside the record and refer this Court to other libel suits pending in Alabama. With the exception of two brought by the other Montgomery commissioners, all are erroneously and uncandidly labeled "companion cases".[49]

But the effort is as revealing as it is desperate. Clearly, petitioner feels that this case, standing on its own, does not present grounds for review.

These cases are not yet tried. There are different plaintiffs; different defendants; different publications; different

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v. Star Co., 174 N. Y. 212, 66 N. E. 723 (charges about a hospital staff with 12 doctors in residence); *Chapa v. Abernethy* (Tex. Civ. App.), 175 S. W. 165 (charges about a posse); *Gross v. Cantor*, 270 N. Y. 93, 200 N. E. 592 (12 radio editors); *Fullerton v. Thompson*, 119 Minn. 136, 143 N. W. 260 (State Board of Medical Examiners, of which there were 9); *Children v. Shinn*, 168 Iowa 531, 150 N. W. 864 (Board of Supervisors); *Reilly v. Curtiss*, 53 N. J. 677, 84 A. 199 (an election board).

Commentators have agreed. See 3 *Restatement of Torts*, Sec. 564, (c), p. 152:

> "[A] statement that all members of a school board or a city council are corrupt is sufficiently definite to constitute a defamatory publication of each member thereof."

And see *Developments in the Law—Defamation*, 69 Harvard L. Rev. 894, et seq.

[49] Times' petition for certiorari, p. 19. Even the Times does not follow the reckless averment of its friends that this suit is part of an "attempt by officials in Alabama to invoke the libel laws against all those who had the temerity to criticize Alabama's conduct in the intense racial conflict" (Brief of Washington Post, p. 8).

communications media; different forums; different attorneys; different issues;[50] no final judgment in any; and a trial on the merits in only one of them. The Times urges this Court to jettison libel laws that have existed since the founding of this Republic, and hold: (a) there is an absolute privilege to defame public officials, at least those living in Alabama; (b) private libel suits for defamation are available to all citizens of the United States in state courts according to state libel laws, but not to persons who happen to hold public office in Alabama; (c) plaintiffs in those cited cases shall be deprived of their rights to have their libel cases heard on their merits.

The Times seems to hint to this Court that because the publication contained statements regarding racial tensions, the law of libel should perforce "confront and be subordinated to" a constitutional privilege to defame.[51] Surely in a field so tense, truthful statements by huge and influential newspapers are imperative. For as this Court said in **Beauharnais**, 343 U. S. 250 at 262:

> "Only those lacking responsible humility will have a confident solution for problems as intractable as the frictions attributable to differences of race, color or religion."

The confrontation which the jury hoped to achieve was the confrontation of the Times with the truth.

The enormity of petitioner's wrong is clear. Hopefully the decision below will impel adherence by this immensely powerful newspaper to high standards of responsible journalism commensurate with its size.

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[50] For example, the Times retracted for Patterson, but not for respondent. Obviously, the Times, while guilty of clear inconsistency, has nevertheless in Patterson's case sought to eliminate punitive damages by retraction, as permitted by Alabama statute.

[51] Times petition, p. 20 and *amici* briefs generally.

cision below is in error. This is obviously the wrong forum for such an argument.[55]

But even if an examination of state law were appropriate, the court below followed its earlier cases. Alabama has held, as have other states, that there is a clear distinction between jurisdiction of the person and subject matter. **Constantine v. Constantine**, 261 Ala. 40, 42, 72 So. 2d 831. A party's appearance in a suit for any purpose other than to contest the court's jurisdiction over the person is a general appearance.[56]

The Alabama cases cited by the Times do not conflict with the decisions below. One case holds that a request for extension of time to file pleadings is not a general appearance;[57] another recognized that defendant might have converted a special appearance into a general appearance, but held that even so a circuit court had authority to set aside a default judgment within thirty days, and denied an extraordinary writ;[58] a third involved a limited attack on "the court jurisdiction over the person of defendant;"[59]

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[55] See Footnote 54.

[56] *Kyser v. American Surety Company*, 213 Ala. 614, 616, 105 So. 689; *Blankenship v. Blankenship*, 263 Ala. 297, 303, 82 So. 2d 335; *Thompson v. Wilson*, 224 Ala. 299-300, 140 So. 439; *Aetna Insurance Company v. Earnest*, 215 Ala. 557, 112 So. 145. And see *Vaughan v. Vaughan*, 267 Ala. 117, 121, 100 So. 2d 1:

> "[R]espondent . . . by not limiting her appearance and by including non-jurisdictional as well as jurisdictional grounds in her motion to vacate has made a general appearance and has thereby waived any defect or insufficiency of service."

[57] *Ex Parte Cullinan*, 224 Ala. 263, 139 So. 255.

[58] *Ex Parte Haisten*, 227 Ala. 183, 149 So. 213.

[59] *St. Mary's Oil Engine Company v. Jackson Ice & Fuel Company*, 224 Ala. 152, 155, 138 So. 834. See also *Sessoms Grocery Co. v. International Sugar Feed Co.*, 188 Ala. 232; *Terminal Oil Mill Co. v. Planters, etc. Co.*, 197 Ala. 429; and *Dozier Lumber Co. v. Smith-Isberg Lumber Co.*, 145 Ala. 317, also cited by the Times.

one did not even consider the question, since apparently neither the trial judge nor the parties had noticed it;[60] one discussed the proper way to plead misnomer;[61] and in the last two the defendants conceded jurisdiction of the person.[62]

Moreover, there is nothing novel about the Alabama holding of general appearance. This Court in such cases as **Western Loan & Savings Company v. Butte, etc. Mining Company**, 210 U. S. 368, 370 and **Davis v. Davis**, 305 U. S. 32, 42, as well as leading text writers,[63] and the majority of the jurisdictions of this country have recognized the binding effect of this rule.[64]

Petitioner argues that the general appearance ground is an untenable non-federal one. Its cases simply do not support its contention. No novel state procedure, of which

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[60] *Harrub v. Hy-Trous Corp.*, 249 Ala. 414, 31 So. 2d 567.

[61] *Ex Parte Textile Workers*, 249 Ala. 136, 142, 30 So. 2d 247.

[62] *Seaboard Ry. v. Hubbard*, 142 Ala. 546, and *Johnson Publishing Co. v. Davis*, 271 Ala. 474, 124 So. 2d 441.

[63] *Restatement of Conflict*, § 82, Comment (b); and Kurland, *The Supreme Court, The Due Process Clause and The In Personam Jurisdiction of State Courts*, 25 U. of Chicago L. Rev. 569, 575:

> "The mere appearance of a defendant in a lawsuit for a purpose other than to attack the jurisdiction of the court over him is considered a voluntary submission to the court's power."

[64] 25 A. L. R. 2d 835, 838 and 31 A. L. R. 2d 258, 265. New York itself prior to statutory amendment, held in *Jackson v. National Grain Mutual Liability Company*, 299 N. Y. 333, 87 N. E. 2d 283, 285:

> "Under its special appearance, the defendant company could do nothing but challenge the jurisdiction of the Justice's court over its person . . . (citation). Hence by its attempt to deny jurisdiction of the subject of the action, the company waived that special appearance and submitted its person to the jurisdiction of the court."

Civil Practice Act, § 273 (a), was necessary to enable a litigant to combine in New York an attack on jurisdiction of the person and of the subject matter without appearing generally in the action. *Ray v. Fairfax County Trust Company*, 186 N. Y. S. 2d 347.

a party could not fairly be deemed to have been apprised, thwarted all means of raising a federal question.[65] Nor is the Alabama rule—in accord with the majority one—an "arid ritual of meaningless form."[66] Clearly beside the point is a case where an admitted special appearance by a party, an officer appointed to run the railroads for the federal government, was not deemed by the state court to be a special appearance for his successor.[67]

Nor do petitioner's cases (pp. 76-77) support the contention that even if there had been jurisdiction by consent because of the general appearance, the commerce clause forbids its exercise. These cases simply hold that a carrier must be given an opportunity to make a seasonable objection to court jurisdiction, and cannot be deprived of doing so by state machinery making a special appearance a general one. Cf. **York v. Texas**, 137 U. S. 15, 20. Alabama does permit a special appearance, and does not prevent a "seasonable motion." But when a foreign corporation makes, instead, a general appearance, the commerce clause does not bar the exercise of court jurisdiction by consent.

Davis v. O'Hara, 266 U. S. 314, 318, discussed by the Times (Brief, pp. 74-75) involved Nebraska, not Alabama law, and held that under Nebraska practice a special appearance was not required to object to jurisdiction over the person.

2. Even if the Times had not made a general appearance in this case, effective service of process is based on decisions of this Court so explicit as to leave no room for real controversy. The Times, having already argued that this

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[65] *NAACP v. Alabama*, 357 U. S. 449, and *Wright v. Georgia*, 373 U. S. 284.

[66] *Staub v. City of Baxley*, 355 U. S. 313, 320.

[67] *Davis v. Wechsler*, 263 U. S. 22.

Court should cast aside its many decisions permitting libel suits against newspapers, now asks this Court to cast aside its cases permitting tort actions against foreign corporations in states where those corporations do business. In short, the Times seeks absolute immunity on the merits, and jurisdictional immunity from suit outside New York state.

The crucial test is simple. Did the Times have sufficient business contacts with Alabama so that suit against it there accorded with traditional concepts of fairness and orderly administration of the laws? **International Shoe Company v. Washington**, 326 U. S. 310, 319. The court below, and indeed the trial court, after painstaking analysis of the jurisdictional facts of record, held that there were sufficient contacts. The qualitative functions of a newspaper outlined in **Consolidated Cosmetics v. DA Publishing Company**, 186 F. 2d 906, 908 (7th Cir. 1951), were carried on in Alabama.

The Times plainly maintained an extensive and continuous pattern of business activity in Alabama at least since 1956. The resident string correspondents and staff correspondents, who repeatedly came into Alabama, were a unique and valuable complement to the news gathering facilities of the Associated Press and United Press and other wire services upon which smaller newspapers rely. Such widespread news gathering facilities unquestionably increase the scope and detail of the Times' news columns, and enhance, accordingly, its prestige, its circulation, and the prices which it can command in the advertising market. In turn, these far-flung news gathering tentacles subject the Times to potential suit in the states into which they reach. If financial reward comes to the Times from its on-the-spot news coverage in Alabama, it is fair that citizens of Alabama should be able to sue the Times here when it has wronged them.

Scoffing at the quantitative size of its business activities in Alabama, the Times apparently ignored the most recent pronouncement of this Court in **Scripto v. Carson**, 362 U. S. 207, cited by the courts below. **Scripto** derived less than half of the revenue from Florida which the Times has derived from Alabama—and regular employees of the Times have combined their efforts with those of independent dealers to produce this result.

The Times attempts to distinguish **Scripto** by the inaccurate observation that "no issue of judicial jurisdiction was involved" (Brief p. 85). But this Court's opinion in **Scripto** stated that the Florida courts had "held that appellant does have sufficient jurisdictional contacts in Florida [to be made a collector of use tax] . . . We agree with the result reached by Florida's courts" (362 U. S. 207, 208). While the Times would argue that due process standards for jurisdiction to sue are stricter than those for jurisdiction to make a tax collector out of a foreign corporation, objective commentators have not agreed. The due process clause "might well be deemed to impose more stringent limitations on collection requirements than on personal jurisdiction".[68]

One contract negotiated entirely by mail with a predecessor company gave California sufficient contact with a successor insurance company. A default judgment against it was upheld. **McGee v. International Insurance Company**, 355 U. S. 220.[69] Mail transactions alone enabled a

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[68] *Developments in the Law—Federal Limitations on State Taxation of Interstate Business*, 75 Harvard L. Rev. 953, 998 (1962).

[69] Noteworthy is the fact that the foreign corporation held amenable to California process had never solicited or done any insurance business in California apart from the policy involved. The "continuing legal relationship" on the basis of which the Times attempts to distinguish *McGee* (Brief, p. 84) could not possibly consist of more than transmission of premiums by mail. Such

Virginia Securities Commission to regulate an out-of-state insurance company. **Travelers Health Association v. Virginia**, 339 U. S. 643. And this Court, as noted in the decision below, commented upon more enlightened concepts resulting in expanded scope of state jurisdiction over foreign corporations. **McGee v. International Insurance Company**, 355 U. S. 220, 222-223. Moreover, state activity through the means of independent contractors, as distinguished from agents or employees, is without constitutional significance. **Scripto v. Carson**, 362 U. S. 207, 211. The Times does not cite **Scripto** on this point, but it is nevertheless the law.

A recent decision, interpreting Alabama's Substituted Service Statute, **Callagas v. Calhoon**, 309 F. 2d 248, 256 (5th Cir. 1962) observed:

> "Since [**Travelers Health** and **McGee**] it is established that correspondence alone may establish sufficient contacts with a state to subject a non-resident to a suit in that state on a cause of action arising out of those contacts."

Justice Black's dissenting opinion in **Polizzi v. Cowles Magazines**, 345 U. S. 663, 667, considered a magazine publisher subject to Florida libel suit, under old or new concepts, when its only contact there was two circulation road men who checked retail outlets in a multi-state area which included Florida. Presumably no reporting or advertising solicitation was carried on. Mr. Justice Black's opinion, which has been widely quoted as expressive of the prevailing view, found it manifestly unfair to make the plaintiff "bring his libel suit in a federal district court in the corporation's home state of Iowa . . . [and not] in a federal court in the state where Polizzi lived and

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"continuing legal relationship" scarcely compares with the vastly more extensive and continuing relationship which the Times maintained with Alabama according to evidence going back to 1956.

where the criminal charges were likely to do him the most harm" (345 U. S. 663 at 668).

Obviously the case at bar does not present an instance of "forum shopping" such as was faced by Judge Hand in **Kilpatrick v. T. & P. Ry. Co.**, 166 F. 2d 788 (2d Cir. 1948). The court's remarks (quoted Brief, p. 81) were directed to a Texas plaintiff, injured in Texas, who had brought his suit in New York. Even so, the district court was reversed for dismissing the plaintiff's action.

McKee, an Alabama resident, conducted all of the usual activities of a stringer for the New York Times. In addition, he performed the delicate task, to which he "naturally" fell heir, of investigating respondent's demand for retraction. The Times was efficaciously brought into court by service on McKee. It is inconceivable, for example, that if while helping Harrison Salisbury obtain material for his Alabama stories, Don McKee had run an automobile into a plaintiff, the Times could have escaped liability by maintaining that McKee was an independent contractor.

Similarly substituted service under the Alabama statute[70] was valid. Alabama business activity of the Times preceded and followed the printing of this libelous material in New York. The ad itself was supposedly cleared on the basis of prior news gathering; it was later sent into Alabama by the Times, with a carrier as its agent, freight prepaid, with title passing on delivery to the consignee. Thence the issue went to newsstands for sale to the Alabama public, in accordance with the longstanding business practice of the Times.[71]

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[70] Title 7, § 199 (1), Code of Alabama.

[71] If the cases cited by the Times (Brief, pp. 79-80) are supposed to conflict with the decision below, they conflict also with the decisions of this Court cited in this section of respondent's brief and by the court below. They conflict, too, with such cases as *Paulos v. Best Securities, Inc.* (Minn.), 109 N. W. 2d 576; *WSAI v. Lyons*, 254 F. 2d 242 (6th Cir. 1958); *Gray v. American Radio*

Scripto v. Carson, 362 U. S. 207, lays to rest the significance of any contention that sales to the public in Alabama were through the medium of independent contractors. It is not necessary for this Court to reach the question of whether isolated newsstand sales, disconnected from any other business activity in Alabama, would be a sufficient contact to sustain substituted service. This is not the case. For the Times has also solicited advertising and gathered news in a systematic and continuous fashion, and has thereby established a firm business connection with Alabama.[72]

Due process and the commerce clause do not immunize the Times from Alabama suit.

As **Polizzi** makes clear, newspapers are not to be in a special category. When other corporations may be sued in a foreign jurisdiction, so may they on similar facts. Newspaper corporations are no more entitled to the favored position which the Times and its friends would accord them than they are entitled to many other preferences for which they have unsuccessfully argued. In **Mabee v. White Plains Publishing Co.**, 327 U. S. 178, 184, this Court

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tor Corporation, 22 Ill. 2d 432, 176 N. E. 2d 761; *Sanders Associates, Inc. v. Galion Iron Works*, 304 F. 2d 915 (1st Cir. 1962); *Beck v. Spindler* (Minn.), 99 N. W. 2d 670; and *Smyth v. Twin State Improvement Corporation*, 116 Vt. 569, 80 A. 2d 664. Moreover, the court in *Insull v. New York World-Telegram*, 273 F. 2d 166, 169 (7th Cir. 1959), indicated that its result would have been different if the newspaper "employ[ed] or ha[d] any reporters, advertising solicitors or other persons who are located in Illinois . . ."

[72] A remarkably similar case is *WSAZ v. Lyons*, 254 F. 2d 242 (6th Cir. 1958), cited by the courts below. There the court upheld a Kentucky libel judgment against a foreign television station which had beamed the libelous television matter into Kentucky from outside the state. Service was had under a Kentucky statute covering causes of action "arising out of" or "connected" with the doing of business by foreign corporations in Kentucky. The court cited *McGee* and *International Shoe*. Moreover, it held irrelevant the fact that Kentucky produced only 1.03 per cent of the total annual advertising revenue.

held: "As the press has business aspects, it has no special immunity from laws applicable to business in general." This case concerned the applicability of the Fair Labor Standards Act to newspapers. This Court has likewise held newspaper corporations subject to the National Labor Relations Act, **Associated Press v. N. L. R. B.**, 301 U. S. 103 and to the anti-trust laws, **Lorain Journal Company v. United States**, 342 U. S. 143.

Hanson v. Denckla, 357 U. S. 235, relied upon by the Times as contrary to the decisions below, is easily distinguishable. As this Court pointed out, there was no solicitation of business in Florida by the foreign corporation, either in person or by mail. In the case at bar the Times solicited business in both manners. The cause of action in **Hanson v. Denckla** did not arise out of an act done or transaction consummated in the forum. On the contrary, this cause of action arose out of the very distribution of the newspapers by the Times in Alabama. Surely the Times cannot contend that its introduction of these newspapers in Alabama was involuntary.[72] The foreign corporation in **Hanson v. Denckla** had received no benefit from the laws of the forum. The manifold business activities of the Times—news gathering, solicitation of advertising and distribution—have received the protection of Alabama laws.

Finally (Brief, pp. 86-88) the Times suggests that even though it might be amenable to suit in Alabama under due process standards, the commerce clause nevertheless bars the Alabama action. The most recent decision of this Court cited in support of this proposition was handed down in 1932. It seems scarcely necessary to observe that this Court, which has developed enlightened standards giving expanded scope to jurisdiction over foreign corporations in such cases as **International Shoe, McGee,**

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[72] But compare Times Brief, p. 81.

Travelers Health and **Scripto** will not grant review to turn the clock back to 1932, and invoke the rigid concepts of earlier days under the aegis of the commerce clause. And the Times must concede that this Court has not "hitherto" held that tort actions against foreign corporations—fairly subject to *in personam* jurisdiction—are unconstitutional as undue burdens on interstate commerce (Brief, p. 87).

Accordingly, even without a general appearance, the Times would have presented no unsettled federal question of jurisdiction for review by this Court on certiorari.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that the writ of certiorari should be dismissed as improvidently granted; in the alternative, respondent respectfully submits that this case should be affirmed.

Respectfully submitted,

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Certificate.

I, M. Roland Nachman, Jr., of Counsel for Respondent, and a member of the bar of this Court, hereby certify that

I have mailed copies of the foregoing Brief and of respondent's Brief in No. 40, Abernathy v. Sullivan, air mail, postage prepaid, to Messrs. Lord, Day & Lord, Counsel for petitioner, at their offices at 25 Broadway, New York, New York. I also certify that I have mailed a copy of the foregoing Brief, air mail, postage prepaid, to Edward S. Greenbaum, Esquire, 285 Madison Avenue, New York, New York, as attorney for American Civil Liberties Union and the New York Civil Liberties Union, as *amici curiae;* to Messrs. Kirkland, Ellis, Hodson, Chaffetz & Masters, attorneys for The Tribune Company, as *amicus curiae,* at their offices at 130 East Randolph Drive, Chicago 1, Illinois; and to William P. Rogers, Esquire, attorney for The Washington Post Company, as *amicus curiae,* at his office at 200 Park Avenue, New York 17, New York.

This ... day of October, 1963.

.....

M. Roland Nachman, Jr.,
Of Counsel for Respondent.

APPENDIX A.

Title 7, Section 909 of the Code of Alabama:

"Truth of the Words, Etc., Evidence Under the General Issue.—In all actions of slander or libel, the truth of the words spoken or written, or the circumstances under which they were spoken or written, may be given in evidence under the general issue in mitigation of the damages."

Truth specially pleaded is an absolute bar to a civil libel action, **Webb v. Gray**, 181 Ala. 408, 62 So. 194; **Ripps v. Herrington**, 241 Ala. 209, 212, 1 So. 2d 899; **Johnson Publishing Co. v. Davis**, 271 Ala. 474, 124 So. 2d 441.

Title 7, Section 910 of the Code of Alabama:

"Libel or Slander; Defamatory Matter.—In an action for libel or slander, it shall be sufficient to state, generally, that the defamatory matter was published or spoken of the plaintiff; and if the allegation be denied, the plaintiff must prove, on the trial, the facts showing that the defamatory matter was published or spoken of him."

Title 7, Section 913 of the Code of Alabama:

"Retraction Mitigates Damages.—The defendant in an action of slander or libel may prove under the general issue in mitigation of damages that the charge was made by mistake or through inadvertence, and that he has retracted the charge and offered amends before suit by publishing an apology in a newspaper when the charge had been thus promulgated, in a prominent position; or verbally, in the presence of witnesses, when the accusation was verbal or written, and had offered to certify the same in writing."

Title 7, Section 914 of the Code of Alabama:

"Aggrieved Person Must Give Notice to Publishers of Alleged Libel Before Vindictive Damages Can Be Recovered.—Vindictive or punitive damages shall not be recovered in any action for libel on account of any publication concerning the official conduct or actions of any public officer, or for the publication of any matter which is proper for public information, unless five days before the bringing of the suit the plaintiff shall have made written demand upon the defendant for a public retraction of the charge or matter published; and the defendant shall have failed or refused to publish within five days in as prominent and public a place or manner as the charge or matter published occupied, a full and fair retraction of such charge or matter."

Title 7, Section 915 of the Code of Alabama:

"When Actual Damages Only Recoverable.—If it shall appear on the trial of an action for libel that an article complained of was published in good faith, that its falsity was due to mistake and misapprehension, and that a full correction or retraction of any false statement therein was published in the next regular issue of said newspaper, or in case of daily newspapers, within five days after service of said notice aforesaid, in as conspicuous a place and type in said newspaper as was the article complained of, then the plaintiff in such case shall recover only actual damages."

Title 7, Section 916 of the Code of Alabama:

"Recantation and Tender; Effect of.—If the Defendant, after or before suit brought, make the recantation and amends recited in the preceding sections, and also tender to the plaintiff a compensation in money, and bring the

same into court, the plaintiff can recover no costs, if the jury believe and find the tender was sufficient."

Title 7, Section 917 of the Code of Alabama:

"Effect of Tender Received.—The receipt of the money tendered, if before suit brought, is a bar to the action; if after suit, releases the defendant from all damages and costs, except the costs which accrued before the tender and receipt of the money."